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ECODIR PROJECT

FINAL REPORT

30 SEPTEMBER 2003

B 5-1000/00/000112 CONVENTION



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I - INTRODUCTION

1. Background to ECODIR

With the growth of the Internet came the need for finding methods to resolve disputes that arose in the online environment. In the year 2000, when the ECODIR project was begun, the benefits of utilising Alternative Dispute Resolution (ADR) for the resolution of cross boarder disputes were well recognised. By that time, the field of Online Dispute Resolution (ODR) had also established itself, with a number of ODR experimental projects having been initiated in the United States and Canada. One of these projects was the CyberTribunal set up by the CRDP at the University of Montreal. The project, which ended in December 1999, proposed online mediation and arbitration services for disputes arising on the Internet. In the last month of its service, about 90 % of the cases were brought by European parties. This highlighted the need for a European electronic dispute resolution body.

2. Contract / Tender

1) SANCO

Since 1993, the European Commission has endeavoured to promote consumer access to justice and the settlement of consumer disputes in the single market. Since 1999, the Commission has recognised the potential of ODR in this respect. (Details of contract / Tender).

2) Irish Government Department of Enterprise, Trade and Employment

In 2001 the ECODIR partners decided that the Faculty of Law, University College Dublin should host the pilot project. Funding was obtained from the Irish Government Department of Enterprise, Trade and Employment to assist in the setting up of the Secretariat in Dublin. (Details of the contract with Enterprise and Trade). It must be underlined that without this complementary financial input, the setting up of the prototype would have been impossible.

3. Methodology

1) The Partners

The ECODIR project is led by a consortium of partners of European and Canadian Universities, ensuring a multidisciplinary approach across the European Union and North America. The consortium is comprised as follows:

- The Centre de Recherche Informatique et Droit (CRID) of the University of Namur, Belgium (lead partner)
- The Centre d'Etudes sur la Coopération Juridique Internationale (CECOJI) of the Centre National de Recherche Scientifique in Paris, France.
- The Centre de Recherche de Droit Public (CRDP) of the University of Montreal, Canada.

- The Faculty of Law, National University of Ireland, University College Dublin, Ireland
- The Cellule Interfacultaire de Technology Assessment (CITA) of the University of Namur, Belgium.
- The Centre de Mediation et d'Arbitrage de Paris (CMAP) of the Chambre de Commerce de Paris, France
- The Institute for Information, Telecommunications and Media Law (ITM) of the University of Meunster, Germany
- The Centre of Law and Computer Studies of the Balearic Islands (CEDIB) of the University of Palma de Mallorca, Spain
- The Faculty of Law at the University of Liege, Belgium
- GlobalSign, Brussels, Belgium
- Online Mediators, USA

In addition, two private industry partners complete the consortium. The first, *e-Resolution*, was¹ a Canadian private company specialising in the provision of on-line dispute technology and services. E-Resolution provided the technological platform on which the ECODIR service to consumers is based. The second, *Arbitration of International Disputes Ltd* (AIDL) is an Irish private company, itself owned by a consortium of professional bodies and industry partners,² which assists in the management of the pilot phase.

The e-resolution bankruptcy in 2001 has created serious difficulties as it will be explained. The main problems was the transfer of the softwares developed by e-resolution notably for the project and definitively its use.

2) *The Advisory Board*

The consortium is supported by an *Advisory Board* composed of representatives spread across Europe from consumer associations, professional associations and national out-of-court dispute settlement organisations. The Advisory Board is comprised as follows:

Philip Van Caenegem, Exodus.
 Carsten Follisch, TrustedShops.
 Geoff Gibas, European Convergent Communications Network.
 Isabelle de Lamberterie, CECOJI (Centre d'études sur la coopération juridique internationale), Paris.
 Staffan Lind, National Board for Consumer Complaint, Sweden.
 Niki Naska, EASA (European Advertising Standards Alliance).
 Ursula Pach, BEUC (the European Consumers' Organisation).
 Alastair Tempest, FEDMA (Federation of European Direct Marketing Associations).

The advisory board provides assistance to the consortium through the Advisory Board meetings at which their input on practical concerns is invited, and by promulgating and disseminating the project through the various members of their networks. We are of opinion that the A.B. input was really quite important during the first phase of the project.

Unfortunately, due to the e-resolution bankruptcy and taking into account the difficulty to run again the ECODIR platform this advisory board has not been joined together apart from the intermediary report.

¹ E-Resolution ceased operations in December, 2001.

² The Bar Council of Ireland; The Law Society of Ireland; The Institute of Chartered Accountants in Ireland; The Chartered Institute of Arbitrators (Irish Branch); The Irish Business and Employers Confederation.

3) Work Packages

I. **Work Package I: socio-economical analysis of ADR on line**³

The socio-economical analysis was based firstly on a survey of various existing ADR bodies (both on and off line) and, secondly, on the in-depth study of a number of these bodies.

The survey focused mainly on the EU Member States, but a number of North-American bodies also participated. Many ADR service providers, consumer association and professional associations were asked to participate. The psychological aspects of mediation in general were scrutinised by specialists working for the CMAP⁴ and Online Resolution. The survey identified, in the context of working ADRs, the advantages, weaknesses, and methods of different ADR mechanisms.

The deeper study was conducted by e-Resolution, a Canadian company which was a member of the ECODIR consortium⁵, and by the CMAP.

The socio-economic analysis highlighted the main concerns of consumers and businesses in relation to ADR mechanisms resolving business to consumer (B2C) disputes.

One of the most important concerns expressed by the business representatives was the **confidentiality** requirement, which is considered as a *sine qua non* condition for companies to participate in an ADR process. Indeed, the confidentiality of the system warrants that the company's reputation will not be affected by the dispute. This is one of the major advantages of ADR compared with public judicial proceedings. In relation to online ADR, the system must guarantee the interested parties the required confidence by the implementation of adapted technical and organisational measures.

The study also revealed that another important advantage of ADR, is **rapidity**. A dispute can be solved within a very short time period. The consumer is not obliged to wait a long for a satisfactory solution. It is also a benefit for the businesses which save money as the time required to manage the follow-up of the dispute resolution is greatly reduced. A flexible ADR scheme is necessary in the Internet media context, but this flexibility must be framed within procedural rules fixing the different steps of the procedure, in order to avoid any waste of time.

In the context of consumer disputes, which generally relate to small amounts of money, the **cost saving** aspect is fundamental. *From the consumer's point of view*, going before the judicial courts is too expensive, especially in an international context. The ADR must therefore offer to the consumer an alternative solution allowing him or her to find a lower cost solution to the dispute. Does this mean that ADR must be free of charge for the consumer? The analysis concludes that a minimal (symbolic) fee should be demanded from the consumer in order to avoid abusive use of ADR systems.

³ The socio-economical analysis has been conducted by I. de Lamberterie (dir.), P. Amblard and B. Pipet (all working for the CECOJI, Paris) and by L. Hennuy (working for the CITA from the University of Namur, under the direction of C. Lobet-Maris). E-Resolution, the CMAP and Online Resolution have also participated in this analysis.

⁴ Chambre de Mediation et d'Arbitrage de Paris (which is part of the Chambre de Commerce de Paris).

⁵ EResolution ceased operations in December 2001.

The additional costs of ADR should be covered by the businesses or, preferably, by the public authorities sponsoring ADR for consumer disputes.

From the business point of view, the cost aspect is less important than the confidentiality one. However, the cost of the ADR must remain reasonable considering the financial importance of the dispute.

The **effectiveness** of the ADR solutions is also a major concern. In the huge majority of cases, the solutions given by or through the ADR are voluntarily implemented. However, in some cases, a party refuses to comply with the ADR solution. The judicial enforcement procedure takes a lot of time and is uncertain since the ADR solutions are often more practical and inspired from equity considerations than, strictly speaking, legal⁶. The judicial enforcement mechanism is certainly not a desirable solution. Another way to explore this issue is by looking to contractual means of enforcement through labels and codes of conducts. If the business is a member of a labelling organisation and the conditions of the concerned label impose obligations on him or her to comply with the ADR decisions, a self-execution mechanism could be set up (penalties, withdrawal of the label in case of non compliance, etc.). To constitute an interesting alternative to the judicial procedure, ADR systems must ensure that resolutions will be implemented without having to bring an action before the courts.

The consumer organisations worry about the ability of the consumer to file a complaint and to follow the ADR in the **language** of his or her country of residence. This concern is particularly an issue for the weaker party to the contract, but is a hard and costly problem for the ADR service providers that have to design and manage ADR schemes on a multi-lingual basis, since electronic commerce has a potential worldwide audience.

Finally, the **fairness** of the ADR mechanism is also underlined as a key factor leading to the success of an ADR scheme. The impartiality of the "neutral"⁷ is therefore fundamental. The process of the appointment of the neutral must be transparent. The procedure rules must also ensure the parties the right to be fairly heard.

II. Work Package II: legal study⁸

The legal analysis was conducted in two steps. Firstly, the different legal rules applicable to the different kinds of ADR mechanisms have been identified and listed. Secondly, the analysis focuses on specific legal issues.

The legal issues raised by the three main steps of each ADR were scrutinised: the submission of a case before an ADR; the ADR procedure itself; and the solution given by the ADR. The analysis was principally guided by European Commission recommendations 98/257/EC and 2001/310/EC.

⁶ See WP II (legal study), on the problem of the taking into account of the mandatory provisions of the applicable law.

⁷ By "neutral", we refer to the third party appointed to help the parties to find a solution to their dispute.

⁸ The legal analysis has been conducted, under the direction of Prof. Yves Pouillet, by Vincent Tilman and Alexandre Cruquenaire (all working for the Crid), with the collaboration of Christiane Unland-Schlebes (ITM), Santiago Cavanillas (dir.) and Cristina Anspachs (both working for UIB).

In relation to the **submission of a case**, the contractual terms constitute the most utilised basis for the competence of ADRs. The form and validity requirements for contractual clauses are very strict for arbitration. Indeed, from a European regulatory point of view, the study indicated that arbitration clauses in consumer contracts are only admitted after the dispute has arisen.

The **operation of ADRs** also raises specific legal issues. Whatever its form, the ADR mechanism has to be designed in a way that ensures the parties a fair and balanced dispute settlement. As mentioned above, the European Commission has issued two recommendations on the principles applicable to out-of-court settlement bodies working on consumer disputes⁹.

- Some specific problems have been highlighted regarding the impact of these principles on the design and implementation of an online ADR scheme.

It seems first of all sometimes difficult to ensure the *impartiality* of both the ADR body and its neutrals. Adequate ways of funding have to be found, as well as appropriate mechanism of neutral appointment.

The 98/257/EC Recommendation also insists on the fact that the ADR solutions should not lead to reduce the level of protection enjoyed by the consumers under EC law (principle of *legality*). Does it imply that the "neutral" has a duty to ensure the respect of mandatory rules (and in particular consumer protection rules)? This solution is very clear concerning arbitration since the arbitration award ends definitively the dispute and prevents the parties from bringing an action before the judicial courts. Concerning the other kinds of ADR, like active mediation, the question is more debatable. It is obviously much more difficult to manage ADRs ensuring a complete legal compliance in a cross-border context since the role of the neutral has to be more active and requires a very broad international legal background. Furthermore, in the context of electronic commerce related cross-border consumer disputes, the determination of the applicable law is "problematic" considering the rules of the Rome convention on the applicable law to contractual obligations. In the context of small cross-border consumer disputes, an interest-based approach seems therefore more appropriate than a right-based approach¹⁰.

Both 98/257 and 2001/310 Recommendations underline the necessity to ensure the *effectiveness* of the ADR mechanisms (rapidity, low cost, etc.). However, enhancing the effectiveness of the dispute resolution mechanism can not damage the *fairness*¹¹ of the ADR. Indeed, a paradox affects ADRs since their effectiveness is a fundamental condition for their attractive character from the consumer point of view, while this effectiveness requires reduction of the procedural guarantees protecting the right of all the parties to present fairly their arguments. A balance has to be found between these two fundamental requirements in the design of an online ADR scheme.

One of the key principles of the 98/257 recommendation is the adversarial principle, which implies that the parties must have the opportunity to present their viewpoint before the ADR body and to hear the arguments and facts put forward by the other party. This principle could raise important practical difficulties in the context of a mediation scheme. Indeed, the mediation is a voluntary process that aims to reach an agreement between the disputing

⁹ Recommendation 98/257/EC and Recommendation 2001/310/EC. On these principles, cf. WP II report, III, 2.2.

¹⁰ See also *infra* concerning the issue of the validity of the ADR solution.

¹¹ Both 98/257 and 2001/310 recommendations also recall this principle.

parties. To "give peace a chance", the parties generally require the information and propositions given to the "neutral" to remain confidential. The adversarial principle is difficult to apply to dispute resolution mechanisms that do not lead to a decision that is imposed to the parties. More broadly, the application of this fundamental principle of the judicial proceedings to voluntary mechanism could undermine them since the parties will fear to disclose possibly negative elements and therefore will no more be willing to participate in.

- The confidentiality is a key issue for mediation systems and becomes crucial in the context of world-wide open digital networks.

The **solution given to the dispute by the ADR body** could constitute an agreement that is a contract, a decision binding for the parties or an arbitral award. Although the EC recommendations do not address the issue of the effectiveness of the solutions given by ADR bodies, it constitutes a key issue for the long-term credibility of ADR bodies and for the establishment of strong consumer confidence in these mechanisms.

The judicial enforcement of binding decisions and of contracts could raise problems since these types of ADR solutions are not necessarily strictly based on legal rules but rather on equity inspired principles or on interest based considerations. A strongly connected issue is the question of the legal force of the ADR solutions. Could an agreement reached through mediation be considered as binding for the parties if this agreement is contrary to mandatory rules? This agreement is unlawful and could therefore not be considered as binding. Its execution relies only on the good will of the parties. This kind of solution meets the interests of both parties and will therefore, in the majority of the cases, be spontaneously executed. However, the attention of the parties, and in particular of the consumer, must be drawn to the fact that the solutions given by the ADR body is not binding for a court, and could only be considered as "legally" binding for the parties if it does not infringe mandatory provision of the applicable law¹².

- A binding decision does not generally prevent recourse to the judicial courts. These decisions are not submitted to specific rules.

Arbitration awards are strictly ruled under the New-York Convention and specific national laws. The *enforcement* of arbitration awards is governed by strict rules and depends on the observance of the mandatory provisions of the applicable law.

III. Work Package III: technical analysis¹³

Both the socio-economic and legal studies highlighted that the implementation of an arbitration scheme in the context of online consumer disputes is not realistic. The complexity of the legal issues to be dealt with makes online arbitration inappropriate for "small" disputes.

Considering the type of dispute to be resolved, an approach based on voluntary mechanisms and on the attempt to find practical solutions meeting the *interests* of the parties seems more adequate than an approach based on the research of strictly legal solutions.

¹² Cf. the transparency principle of the 98/257 and 2001/310 recommendations.

¹³ The technical analysis has been conducted, under the direction of Karim Benyekhlef (CRDP and eResolution), by Joëlle Thibaut with the collaboration of Aubert Landry (all working for eResolution) and Vincent Tilman (from CRID).

The ECODIR dispute resolution process has been divided into **three successive phases**¹⁴: negotiation phase, mediation phase, and recommendation phase.

At the **first step** of the process, a party invites another to negotiate through the ECODIR platform. The negotiation phase runs only between the disputing parties and without the interference of any ECODIR appointed "neutral". The period allocated to the parties to negotiate is strictly limited (18 days). If the parties do not reach an agreement within the foreseen period, they have the opportunity either to terminate the process or to commence the mediation phase.

The **second step** is the mediation phase. If both of the parties agree to participate in the mediation, a mediator is appointed. He is given access to the information exchanged between the parties during the negotiation phase and invites the parties to exchange their arguments. Based on the opinions and arguments of the parties, on the solutions proposed by them and on the rights and obligations of the parties, the mediator proposes different solutions to the parties. The parties rank and comment on the proposed solutions. If the parties select at least one common solution, the dispute is considered as resolved. The mediator prepares an agreement form and submits it to the parties' approval. If the parties do not select a common solution within a defined period (15 days), the recommendation phase is initiated.

The **third step** consists of the issuing of a motivated recommendation. This recommendation does not legally bind the parties, except if they have entered into a prior agreement to that effect. In other cases, if the parties do not approve the recommendation within a predetermined period (4 days), the case is considered terminated. If they agree with the recommendation, it becomes a settlement which will be formalised into an agreement by the mediator.

The process is designed in a manner that ensures a high level of *effectiveness* since all its steps are clearly limited by time limits.

The process is completely voluntary, which enables the avoidance of the legal problems raised by contractual clauses that require parties to submit a dispute to an ADR before it has arisen.

- The parties maintain the liberty to quit the process at any stage. The parties are given opportunity to exchange their arguments. The rules impose on the neutral the duty to assist the parties in an independent and impartial manner in their attempt to find a solution to their dispute. The neutrals' appointment rules also provide that the neutral has to be independent from the parties.

In relation to the *cost* of ADR, as this factor is more important from the consumer's point of view, it has been decided to provide the ECODIR service for free in order to encourage the submission of cases. The pilot phase will also be used to try and find merchants interested in the holding of the ECODIR seal, in order to ensure a long-term funding.

As the ECODIR process is voluntary, the *confidentiality* is probably its cornerstone. The business actors insist on this element. The rules provide that the confidentiality of all elements disclosed by the parties must be guaranteed if the parties require it. From a technical point of

¹⁴ Cf. Ecodir resolution rules.

view, the platform has been secured in order to ensure the confidentiality of the information exchanged between the parties and with the neutral. ECODIR relies on the extensive experience of e-Resolution in this matter.

- To ensure the effectiveness of the solutions reached through ECODIR, the rules provide that the clerk's office check the implementation of the settlements.

Finally, the best solutions for consumer disputes would be to set up a platform enabling all consumers to initiate a process in the *language* of their habitual residence. However, this solution is impossible from a practical and financial point of view. The ECODIR platform will therefore be available only in English and French initially.

IV. Work Package IV: The Pilot Study

The information revealed by the three work packages was combined and extensively considered. The result was the implementation of the ECODIR pilot phase, the analysis of which forms the basis of the remainder of this report.

II - ANALYSIS

1. Changes to the System

1) The Rules

No changes to the ECODIR Resolution Rules were made during the pilot phase. However, it is thought that Article 10 on confidentiality should be altered so as to indicate that all exchanges of information or documentation made on the ECODIR platform are made “without prejudice”.

2) The Platform

A number of issues that require further attention arose in relation to the platform itself.

On one occasion, the first party had great difficulty **engaging the participation** of the other party, who was a business. The first party gave the email address of the business’s customer relations department, and an email notifying the department that a case at ECODIR had been filed against it was sent. However, the ECODIR secretariat received a notification email from the business stating that they were not accepting emails. The email contained the following wording:

“Due to the large volume of Unsolicited Commercial E-Mail (SPAM) we receive, we now ask that you to resend this and any future support requests through our website. Use the following link to access our web-based contact form...”

The first party’s **passwords were required** to access this web-based contact form, therefore the ECODIR secretariat could not post the email there. The situation highlights the reliance the system places on an email address and the difficulty that may be associated with that.

Also in relation to emails, the ECODIR secretariat has found that many business parties do not respond to the automatically generated email notifying the business that a case has been filed against it. This may be due to the tone and wording of the email used which was rather unfriendly. For example, the email begins as follows:

Hello X.

ECODIR was recently contacted by Y, who filed an Invitation to negotiate and identified X as the 2nd Party.

In addition, **relatively little information** was given on what ECODIR is, or more importantly, what it is not. The secretariat has found that, since ECODIR is as yet relatively unknown, business parties require an explanation of the project. It seems they need to be made aware of, amongst other things, the fact that that ECODIR will not pass judgement on them or restrict their legal rights in any way. In response to this, the secretariat has begun to follow the automatically generated notification email with another email outlining what ECODIR is and does in a friendlier manner. This email contains the following wording:

Please allow me to explain ECODIR (you can visit our web-site at www.ecodir.org for more details):

We are a neutral organisation, supported by funding from the European Union and the Irish Government.

We are not a consumer body or representative; nor are we a regulatory or investigatory authority.

We do not make or pass judgments.

What we do is provide a secure private web space in which consumers and businesses can discuss their differences.

We hope that this will enable them to find a mutually agreeable solution to their problem.

We hope, in turn, that this will improve consumer confidence in e-commerce and give businesses an efficient means of monitoring consumer views and preventing consumer complaints from getting out of hand.

The process is voluntary and you can withdraw from it at any time. At the moment we are running a pilot project and so the process is entirely free.

We would be grateful if Y would give ECODIR a try - it is entirely confidential and free; and there is nothing to lose.

This change has led to more businesses engaging in the process, therefore it is recommended that an alteration to the automatically generated notification email is made.

A number of changes were made to the “FAQs” during the pilot phase. The titles of the questions were not altered, but the answers were rephrased to give a clearer explanation of many of the aspects of the ECODIR process.

It has been brought to the secretariat’s attention that a difficulty in relation to the **modification of filed forms** exists. Once a party has filed the form and saved it on the platform, if they then click on “modify”, the form is cleared and all details are lost. This proves to be an issue on the forms that offer free text space for the party to outline his or her position. On one occasion a party saved five paragraphs in such a space, wished to correct the spelling of one word, clicked “modify”, and lost all the text. A technical means to avoid this problem should definitely be found.

It is thought that the ECODIR platform should be offered in **different languages**; however the demand for such was not ascertainable from the results of the pilot phase. This is because the vast majority of cases were filed in English, and persons who could not navigate the site due to language difficulties would not have filed a case at all.

Another issue involves **the terms and conditions** of ECODIR. It is thought that these should be set out in full at the end of the case filing procedure, rather than a link being provided to them as is currently the case.

3) The Forms

No difficulties with the forms have been expressed. In fact a number of parties have stated that they are impressed by the clarity of this aspect of the process. It is felt that the forms give the parties good opportunity to pigeonhole their complaint or proposal in a clear, efficient manner.

2. Analysis of the Pilot Phase

There were 51 cases filed with ECODIR during the pilot phase. Out of these, 23 are presumed to be genuine disputes. The remaining 28 are presumed to be test cases. From these cases, a number of observations may be made.

It is evident that the **system works**. The parties have navigated through the platform with ease, have had very few problems filing complaints, and a significant number of them have entered the negotiation phase. A number of cases have in fact been settled. One conclusion that can therefore be drawn from these cases is that the system is capable of operating as intended - its potential success as an ODR service is capable of being realised.

It may be observed that the majority of the cases presumed to be genuine were between parties from **different countries**. This possibility for conducting cross boarder disputes online is one of the benefits of ODR, therefore this outcome is not surprising. However, a significant proportion of cases had no cross boarder element, proving that ECODIR is not restricted to cross boarder disputes.

It seems that ECODIR is being utilised for the resolution of **low-value disputes**. In most cases, the transaction giving rise to the dispute had a value of less than €350. Most of the disputes were within the €0 – 50 range. It should however be noted that it is not always possible to tell from the details provided by the parties exactly what the value of the primary transaction was. For this reason, these values are unknown in a number of cases.

Most of the disputes were between a **commercial party and a consumer** (B2C) with the consumer filing the complaint. ECODIR aims to assist in the resolution of disputes of this nature and the pilot project has proven that demand for such assistance exists.

The vast majority of cases were conducted **in English**. This does not however indicate that a translation of ECODIR into other languages would not be necessary. The demand for such could not be determined as of course those who could not navigate the platform due to language simply did not file a case.

“Products and Services” was undoubtedly the **category of problem** most complained about. A significant number of parties included a “Financial” or “Commercial Practice” complaint also when complaining about a product or service.

The **upload capability** of the platform has proved useful. Documents were uploaded in a number of cases.

The **test cases**, while not relating to genuine disputes, are instructive. Details of the locations and languages of the parties are helpful in forming impressions on such issues, regardless of

the fact that the cases were not genuine. In relation to the simulated disputes themselves, these demonstrate the type of disputes the simulator envisages ECODIR resolving.

3. Lessons from the ECODIR platform experience

1) The difficulty to attract businesses to participate in the dispute resolution process

One of the most important difficulties ECODIR faced during its pilot phase was the reluctance of some businesses to participate in the dispute resolution process.

Surprisingly, private bodies like ECODIR do not give businesses a first feeling of **confidence**, which is a necessary condition to their participation in the process.

Discussions with businesses' representatives¹⁵ highlighted that businesses' attention is focused on :

- confidentiality and integrity of the disclosed data : the ODR system has to provide for sufficient level of data security (the use of digital signature was suggested) ;
- complete transparency of the mediation process : for businesses, the ECODIR appointment of mediators did not give enough appearance of neutrality (criteria for appointment not described in details on the web site, etc.) ;

Unfortunately, it was not possible during the pilot phase of ECODIR to implement high level security systems. According to businesses, the fact ECODIR dispute resolution process was running under a <https://> address was not sufficient. From the consumer point of view, this issue did not seem to be as important.

The major difficulty concerning the management of the panel of mediators is the **lack of funding** which prevented ECODIR to pay mediators. The possible collaboration with the CEPANI (Belgian Center for Mediation and Arbitration, hosted by the Belgian Companies Federation - FEB) was therefore difficult, while this body was very interested in participating in the initiative concerning this particular task. That kind of cooperation should be investigated for a possible commercial exploitation.

The **transparency** requirement duly highlighted by the businesses' representatives is a key point. A solution could be to separate the mediators panel management from the dispute resolution platform (see recommendations, point 6 – conclusion of this final report). Again, it was not financially possible during the pilot phase.

¹⁵ Meeting at the Luxembourg Ministry of Economy, with Luxembourg Chamber of Commerce representatives (27 May 2002).

2) The possible extension of the scope of the process to off-line ADRs

The rapid development and implementation of the ECODIR platform required a limitation in its scope. If this limitation enables to offer a completely new service within a very short period of time (about one year), it has the disadvantage to exclude lots of disputes from the scope of the ECODIR process.

The extension of the ECODIR scope is however a very sensitive issue since it could require to partly re-design the platform or to find new mediators specialised in the new types of dispute to be covered.

The long-term success of ECODIR could therefore rely on its **link with existing alternative dispute already operating off-line**.

Some off-line dispute resolution bodies have acquired a reputation of seriousness and efficiency. A way to promote ODR systems could be to offer these bodies the possibility to extend their activities on-line. ODR could therefore enjoy the reputation and experience of their partners and attract more easily disputing parties thanks to the offer of new services with a high level of quality.

This possible synergy between off-line and on-line ADRs is one of the key issues to be dealt with in the ODR Luxembourg project (Appendix 2, point ii – CRID activities)¹⁶.

3) The difficulty to find long-term funding for the exploitation of ODRs

A very important practical difficulty for ODRs is the research for **long-term funding**.

Public bodies (like the European Union or the Member States) want to promote ODRs.

However, granted fundings aim at developing private self-supporting initiatives. Public bodies have therefore a short-term vision of their support on ODRs. This requires from the ODRs to find their own funding resources.

The main problem of private funding is the independence of the dispute resolution process from its funding bodies. Indeed, consumer associations do not have the resources to support that kind of initiatives. Businesses have the resources but then want to control their use...

The impartiality of ODRs is a *sine qua non* condition of their development and long-term survival. Otherwise, consumers will never use ODRs.

Both parties (consumer and businesses) have to trust in the dispute resolution body.

¹⁶ See also recommendations, point 1, conclusion of this final report.

The only reasonable solution seems to be **the involvement of the public authorities on a long-term basis**.

In this way, the Luxembourg government entitled the CRID to investigate the feasibility of an ODR supported by the Luxembourg Ministry of Economy and to be possibly linked to the Luxembourg e-commerce certificate managed by the same Ministry (see <http://www.e-certification.lu/>). The involvement of public authorities in the labelling and ODR systems is probably the best way to ensure their success since it offers the interested parties the two most important guaranties: the independence of the system and its long-term viability.

Considering the financial difficulties of many companies offering e-commerce services, this last point is certainly not to ignore. Indeed, a company (or a consumer) will be reluctant to submit the resolution of its dispute to a body with an uncertain future. The involvement of public authorities resolves this problem.

The e-commerce directive imposes Member States to “*encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned*” (article 17.2 of the 2000/31/EC Directive of the European Parliament and of the Council of 8. June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *Official Journal*, L 178 , 17 July 2000, P. 0001 - 0016).

Of course, it does not mean that Member States have the obligation to be directly involved in ADR projects. Different kinds of indirect support are also possible: limited funding of initiatives, public control of the ADR services (compliance with the procedural guarantees), etc.

However, the ECODIR experience reveals the extreme difficulty to find : 1) a private funding ; 2) private bodies wanting to invest money in ODR without being deeply involved in the running of the system ; 3) private bodies wanting to support ODRs on a long-term basis or, even, on a mid-term basis.

The public funding or, better, the direct **public involvement** seems therefore to be the only way to effectively promote online dispute resolution mechanisms for consumer disputes.

The situation of B to B disputes is a little bit different since the disputes generally involve a more important amount of money, which enables to justify more easily to charge the disputing parties for the service.

4) *The efficiency of ODRs*

The credibility of ODRs relies on the fairness of the process (see above), but also on its efficiency.

One of the weaknesses of the ECODIR platform is its **incapacity to enforce** the settlements reached by the parties.

The connections between **codes of conducts** and on-line dispute resolution systems could constitute an appropriate answer to this problem (see recommendations, point 7, conclusion of the final report).

The integration of ODRs within **labelling systems** is also an interesting mean to ensure a greater efficiency through a better enforcement of the reached settlements. Of course, the value of the label and the credibility of the labelling authority have a great impact on the usefulness of this synergy. The involvement of public authorities in labelling systems can offer the required credibility (independence and long-term viability). The success of the label sponsored by the Luxembourg Ministry of Economy¹⁷ clearly shows that businesses are waiting for that kind of public scheme.

The efficiency of the ODR can also be reduced by problems faced by the parties during the **description of the dispute phase**¹⁸.

It is therefore important to consider the dispute resolution process as a whole. The drafting of the claim is an important preliminary stage, since it enables the other party to understand its "opponent's" point of view. If the mediation process starts by a misunderstanding between the parties, it will be very difficult to reach an agreement.

The dispute resolution process design should therefore fully integrate the claim drafting stage in order to enhance its efficiency (see recommendations, point 3, conclusion of the final report).

5) *A specific problem : the technology dependence*

The ECODIR experience has shown some of the possible dangers of information technologies. Online dispute resolution service providers need a **specific technology** to be able to provide their services. In most of the cases, they are not able to develop and maintain these software's. The most convenient solution is therefore to ask a specialised company to create the software. By doing this, providers can become completely dependent on this external partner (see infra 6.).

¹⁷ See <http://www.e-certification.lu/>.

¹⁸ Possible synergies with cc-Form project have therefore been investigated (see appendix 2).

Concerning ECODIR, the situation was different since the e-Resolution company was member of the consortium. There was therefore no problem with the exploitation of the platform.

However, e-Resolution bankruptcy (in 2001) put the consortium in troubles considering the fact that all computer skills and know-how relating to the platform (development, maintenance, updating...) were no more available. Furthermore, considering the e-Resolution experience, the consortium decided from the beginning of the project to host the platform in Quebec.

The consortium had therefore to find out rapidly: 1) a new technical partner or subcontractor able to provide hosting services and enough guarantees of security (due to the transfer of confidential data) and quality for the running of the ECODIR services ; 2) a solution concerning the intellectual property rights on the platform since e-Resolution granted a free-of-charge license to the consortium only until the end of the pilot phase.

The complete dependence of the consortium vis-à-vis of e-Resolution for all technical issues became a very important problem since the consortium had not the money neither to hire the people having developed the platform nor to buy the rights on the platform by the company having acquired them (for the use after the pilot phase).

The development of a new platform requires a lot of money and raises intellectual property problems (see next point) since the new platform could not infringe the rights on the former one. This solution was therefore abandoned.

The possible technological dependence is an important issue for the setting-up of ODRs.

6) *ECODIR and intellectual property rights*

The technology dependence mentioned above is only one aspect of a larger concern: the intellectual property rights issues.

As a matter of fact, problems may not only arise in relation with the Ecodir technology provider (bankruptcy, end of contract,...) but also with other software developers who own a patent on a software or a method related to online dispute resolution. The differences between copyright protection and patent protection as well as an brief analysis of the current patents or patent applications on online dispute resolution methods will be dealt in the document in appendix 5.

In addition to the software protection, many other elements of the Ecodir platform are protected by intellectual property rights. The content and the denomination used on the platform are Ecodir's protected assets. The different applicable legal protections such as copyright law, database law, design law and trademark law as well as other related questions (meta-tags, domain names and hyperlinks) are detailed in the document in appendix 5.

III - APPENDICES

Appendix 1 : Factual Data From Pilot Project

Appendix 2 : Presentations given and Bodies Visited

Appendix 3 : Mention of the ECODIR project in publications

Appendix 4 : Publication : le développement des modes alternatifs de règlement des litiges de consommation : quelques réflexions inspirées par l'expérience ECODIR

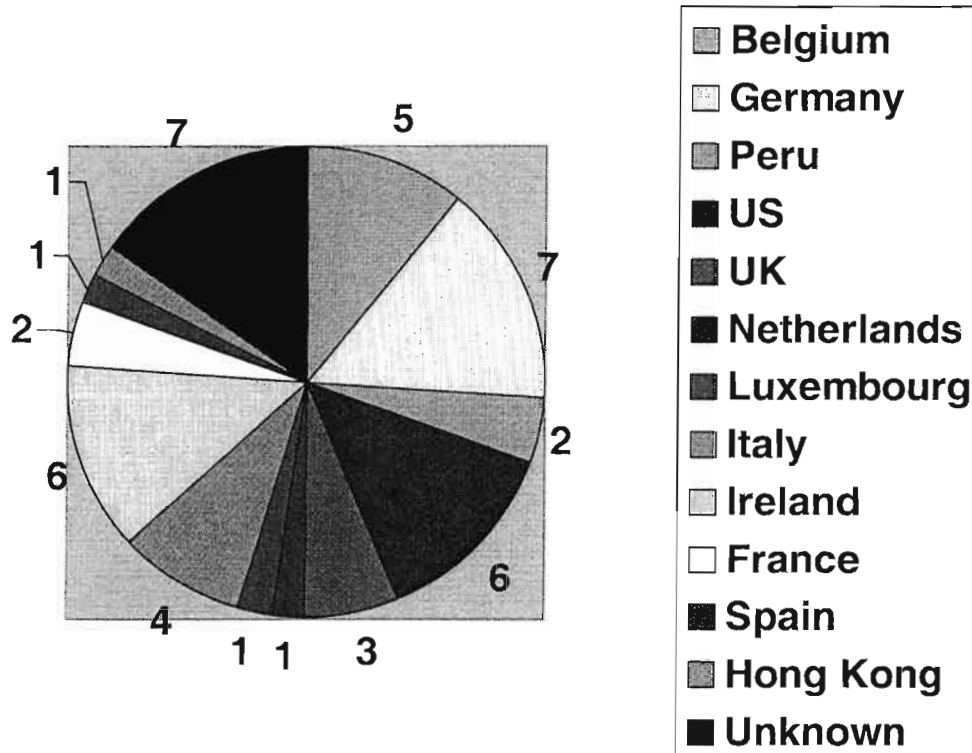
Appendix 5 : Intellectual property rights related to Ecodir

1. Appendix : Factual Data From Pilot Project

1) Original Data

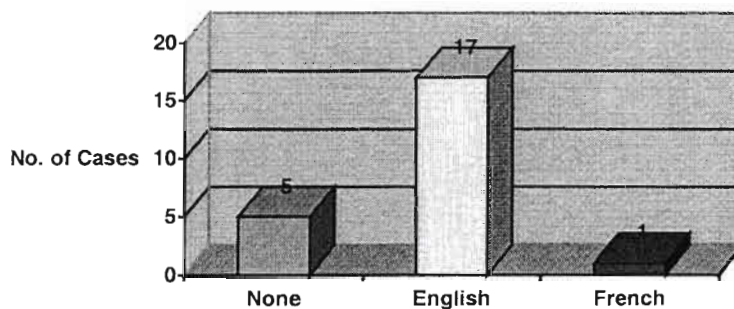
Presumed Genuine Cases (23) No. 1

1. Location of the parties:



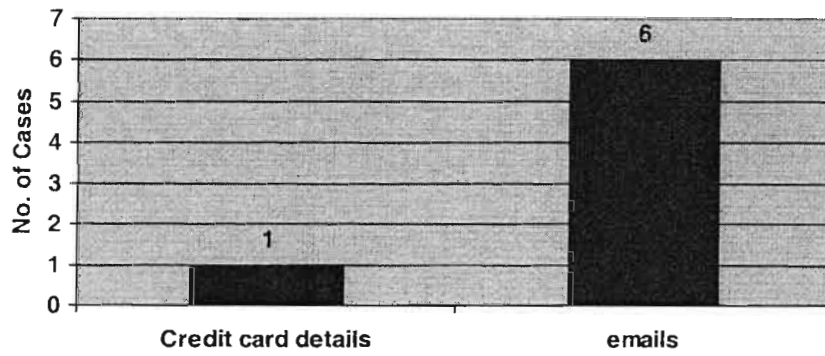
2. Number of cases that were known to be cross-boarder: 14

3. Language the process was conducted in:

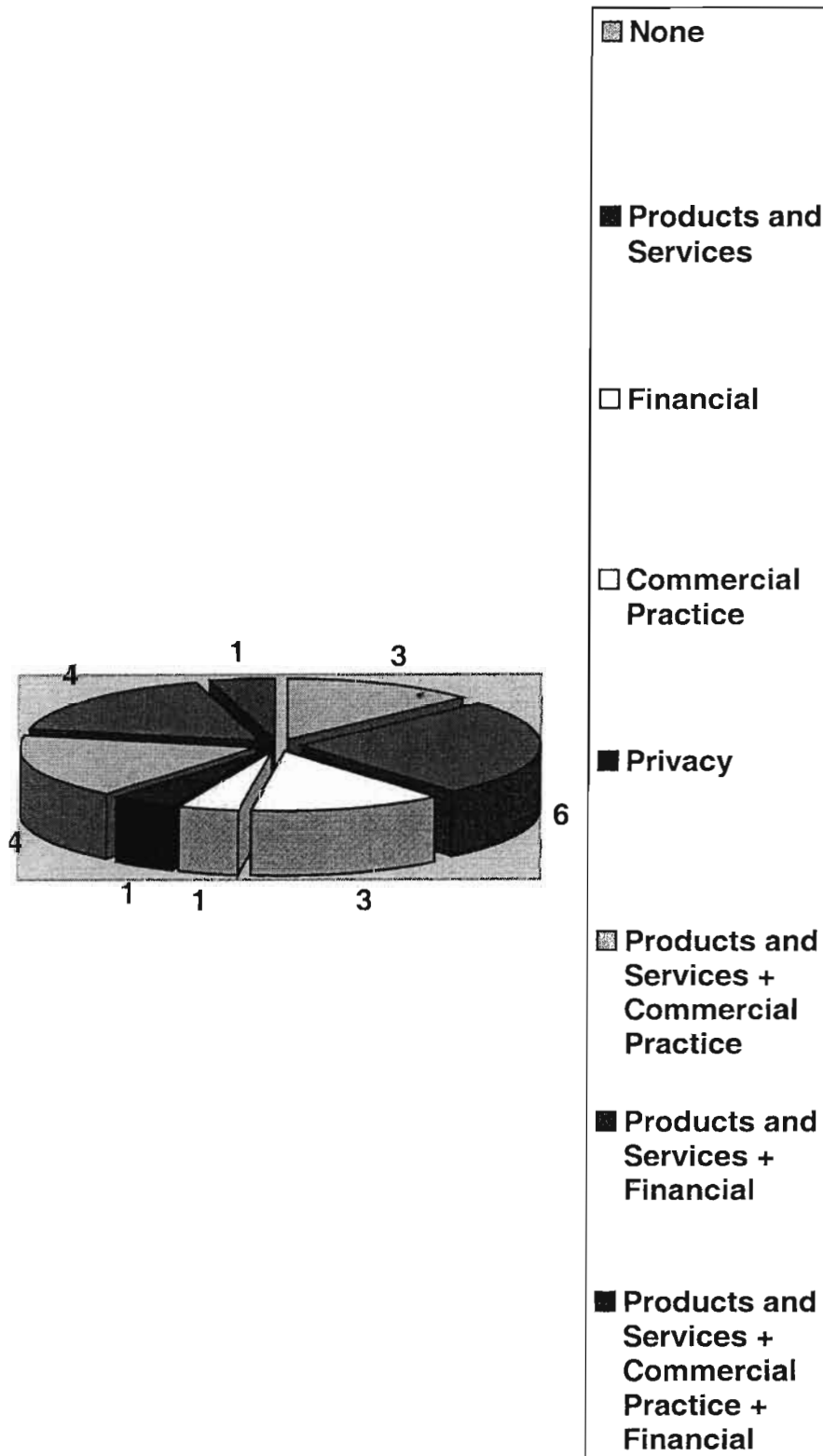


(Note: "None" represents cases where no proposal form was completed fully or at all, therefore language was not ascertainable)

4. Number of cases in which the first party completed case filing: 16
5. Of these (above), number of cases in which the second party responded : 2
6. Nature of documents uploaded during the process :



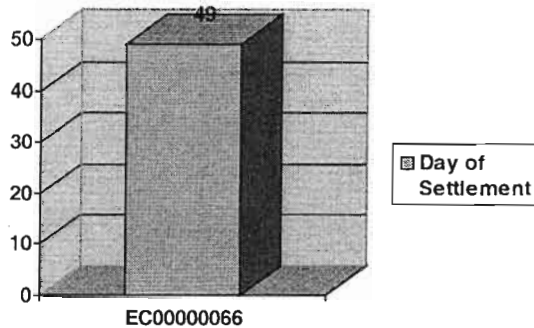
7. Nature of the dispute:



(Note: "None" represents cases where no proposal form was completed fully or at all, therefore the nature of the dispute was not ascertainable)

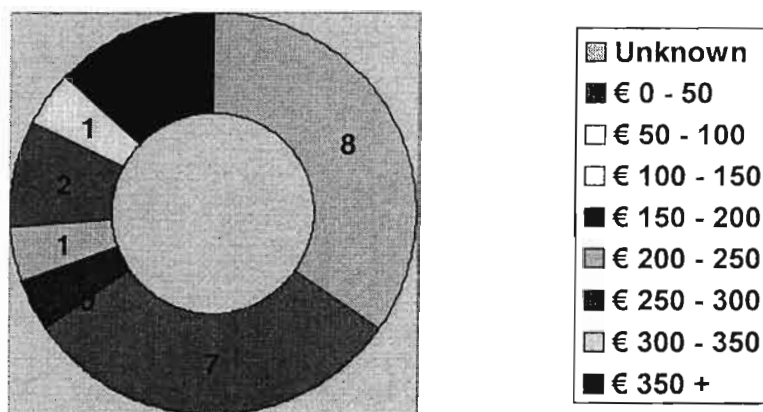
8. Number of cases that settled: 2

9. Point at which a settlement was reached:



(Note: the point at which the other case settled is not ascertainable as the parties did not settle on the platform)

10. Monetary value of the transaction giving rise to the dispute:



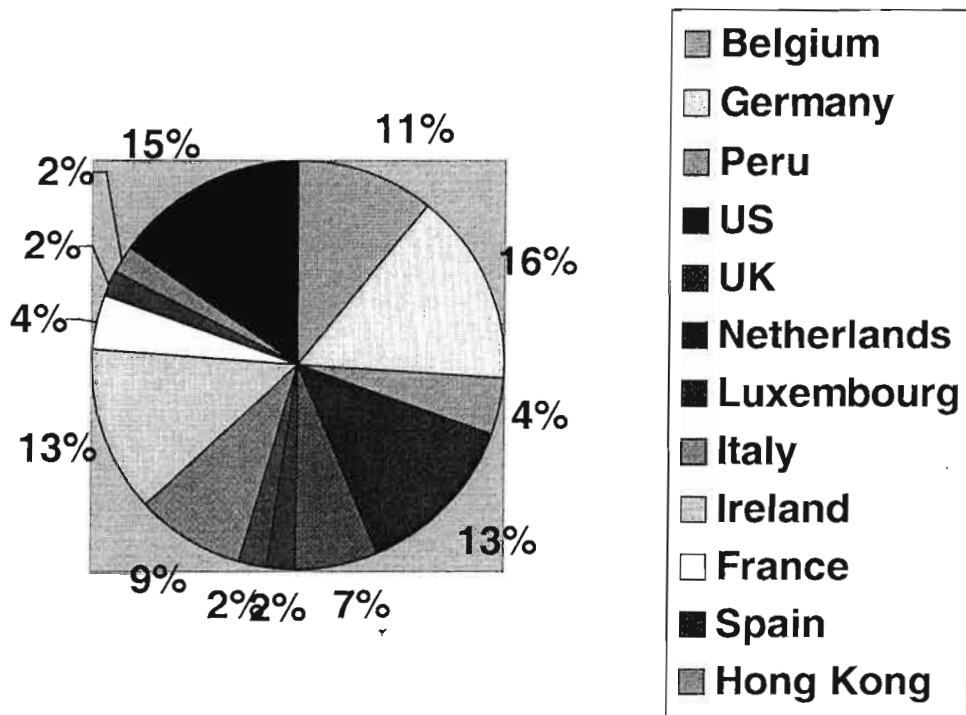
(Note: 3 of the cases related to transactions with a monetary value of more than €350. The values at issue were €565, €785 and the cost of 1 week in a hotel in Gran Canaria.)

11. Number of cases in which the 1st Party had previously filed another case against the second party: 7

12. Number of case in which a mediator was requested: 1 (requested following the 18 day negotiation phase). The mediator made 17 communications during the process.

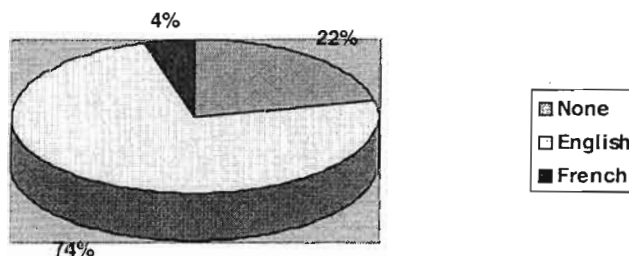
Presumed Genuine Cases (23) No. 2

1. Location of the parties:



2. Cases that were known to be cross-boarder: 60.9%

3. Language the process was conducted in:

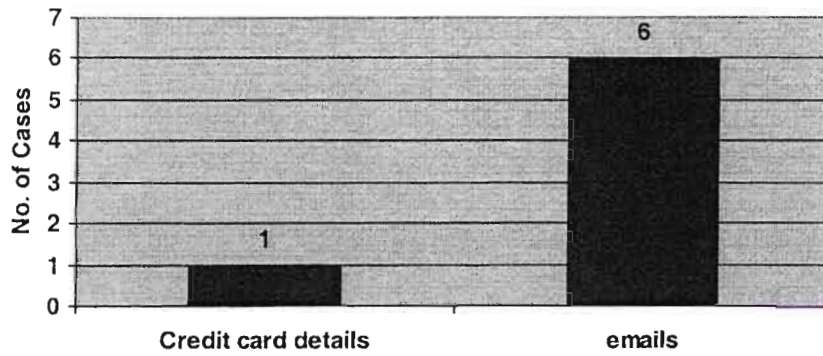


(Note: "None" represents cases where no proposal form was completed fully or at all, therefore language was not ascertainable)

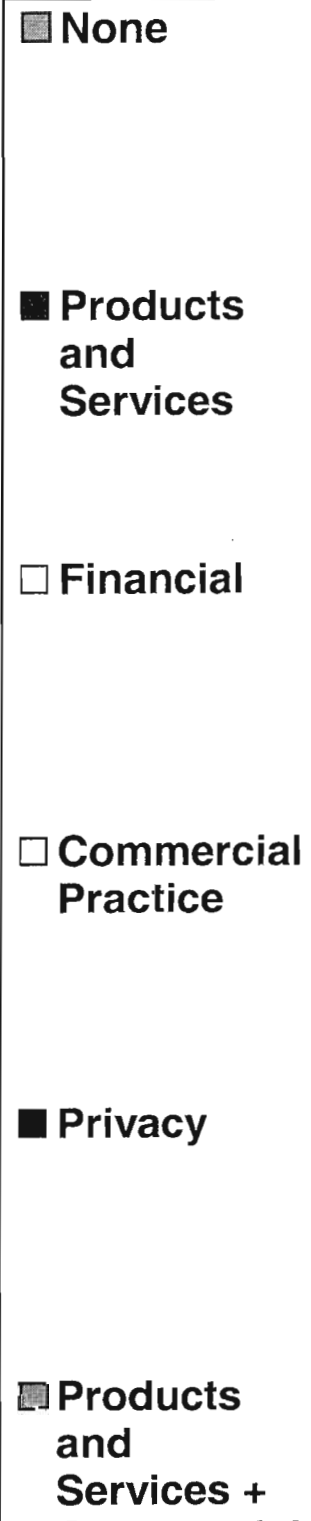
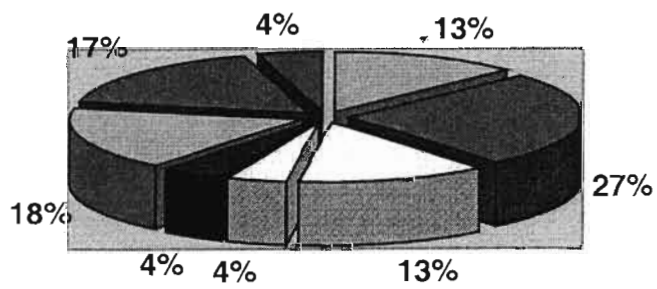
4. Cases in which the first party completed case filing: 69.6%

5. Of these (above), cases in which the second party responded: 12.5%

6. Nature of documents uploaded during the process:



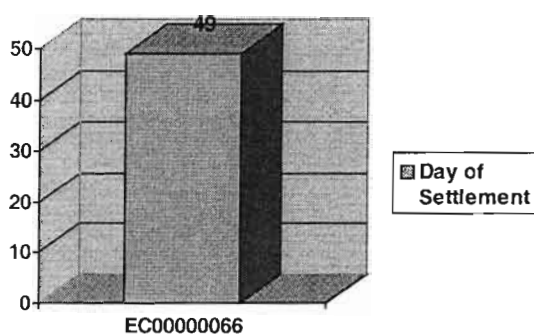
7. Nature of the dispute:



(Note: "None" represents cases where no proposal form was completed fully or at all, therefore the nature of the dispute was not ascertainable)

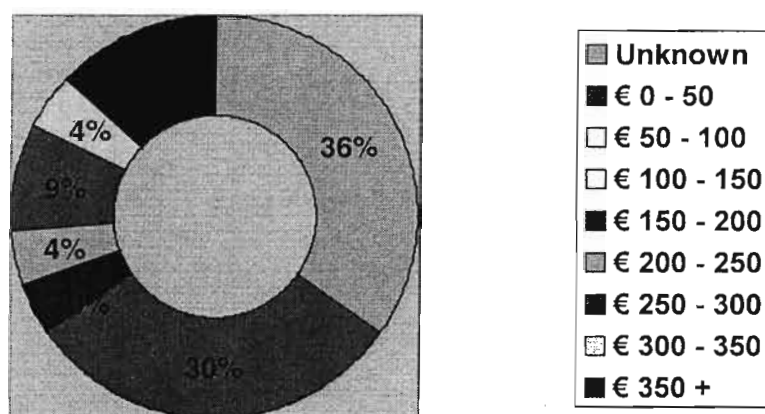
8. Cases that settled: 8.7%

9. Point at which a settlement was reached:



(Note: the point at which the other case settled is not ascertainable as the parties did not settle on the platform)

10. Monetary value of the transaction giving rise to the dispute:



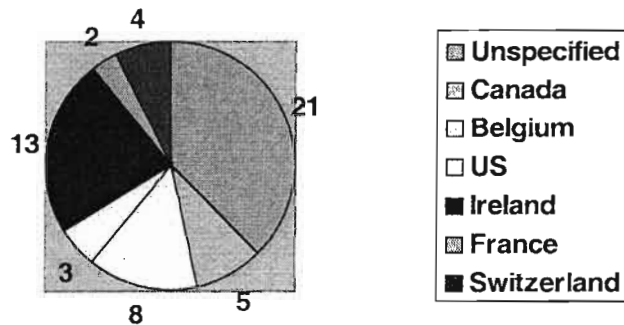
(Note: 3 of the cases related to transactions with a monetary value of more than €350. The values at issue were €565, €785 and the cost of 1 week in a hotel in Gran Canaria.)

11. Cases in which the 1st Party had previously filed another case against the second party: 30.4%

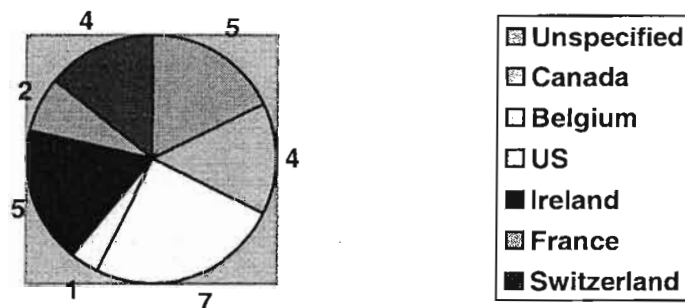
12. Cases in which a mediator was requested: 4.3% (requested following the 18 day negotiation phase). The mediator made 17 communications during the process.

Presumed Test Cases (28) No.1

1. Location of the parties:

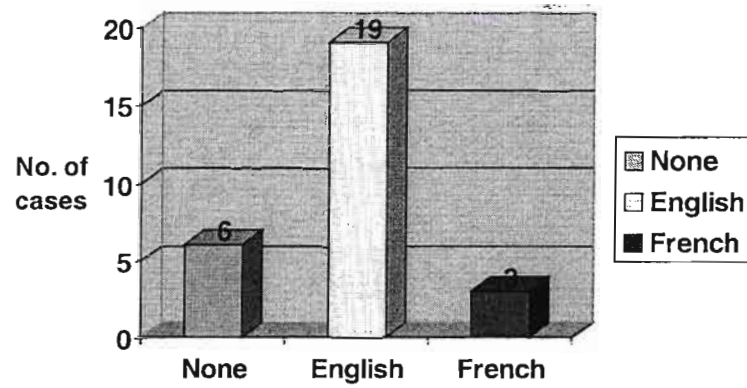


2. Location of first parties (as for most of the test cases, the second parties were fictional):



3. No. of cases that were stated to be cross-boarder: 7

4. Language the process was conducted in:

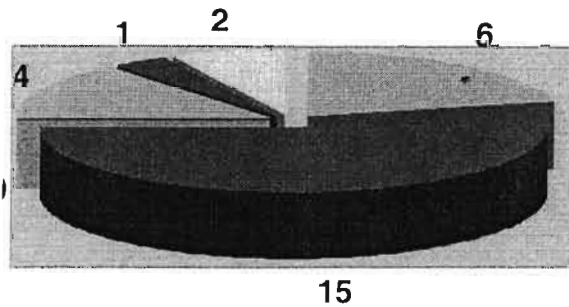


(Note: "None" represents cases where no proposal form was completed fully or at all, therefore language was not ascertainable)

5. Nature of documents uploaded during the process:

Test attachments: Documents were uploaded in 8 cases.

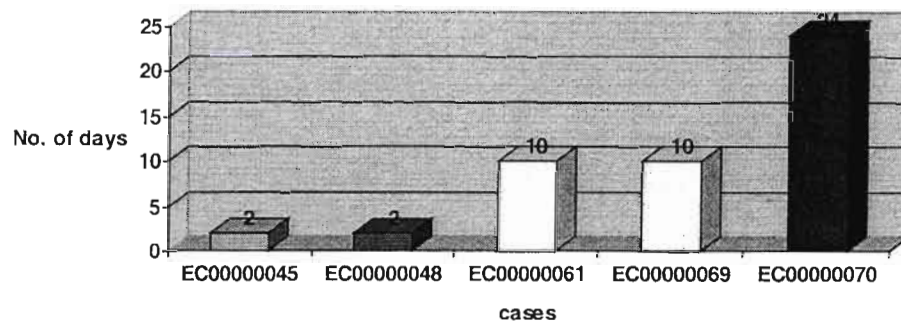
6. Nature of the dispute:



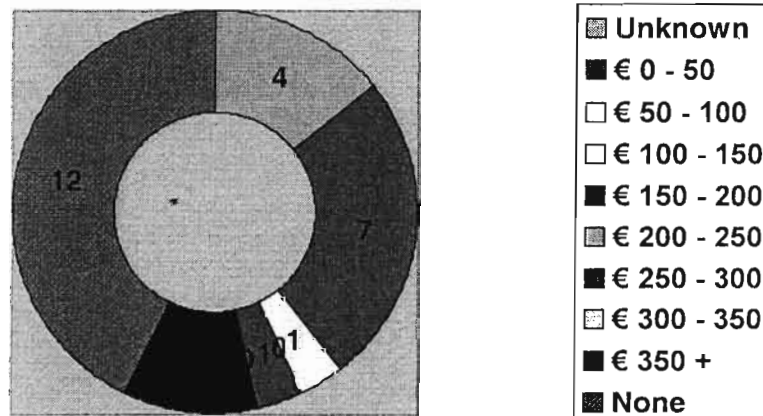
(Note: "None" represents cases where no proposal form was completed fully or at all, therefore the nature of the dispute was not ascertainable)

7. Number of cases that settled: 5

8. Point at which a settlement was reached:



9. Monetary value of the transaction giving rise to the dispute:

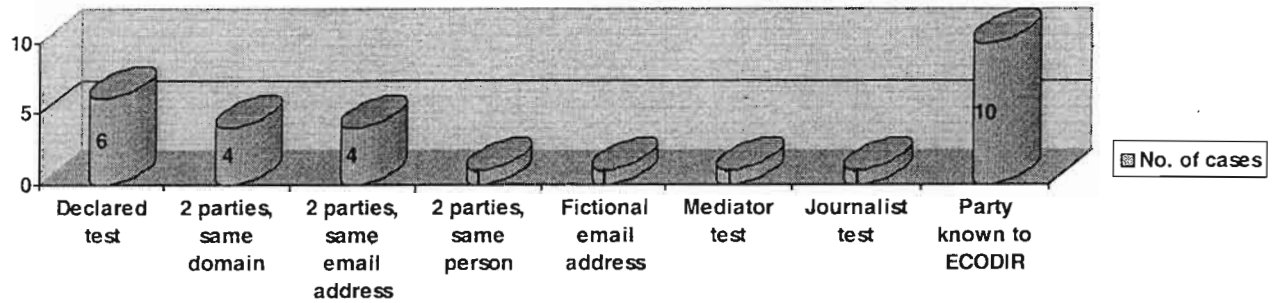


Note:

“Unknown” represents cases in which the monetary value of the transaction was unclear from the case details.

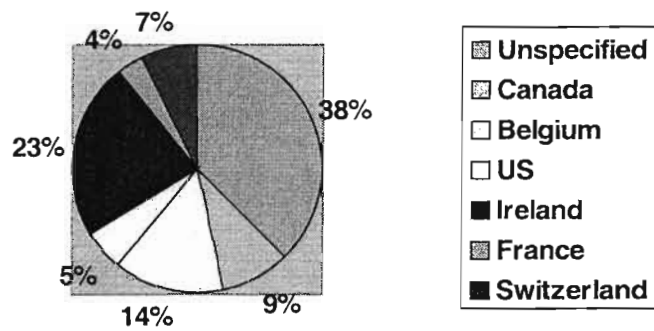
“None” represents cases that did not proceed beyond the case initiation stage and therefore contained no details on such things as monetary value, or cases filed in incoherent language.

10. Reasons why the case is presumed to be a test:

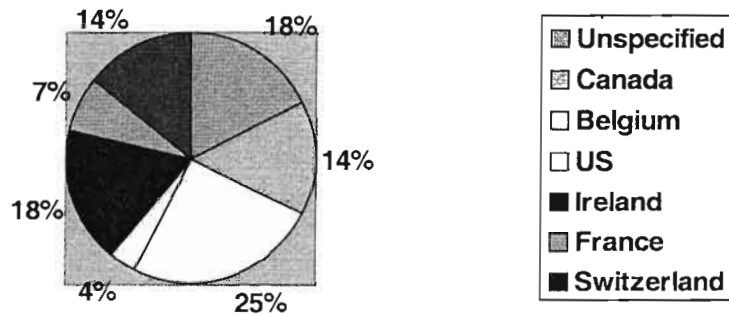


Presumed Test Cases (28) No.2

1. Location of the parties:

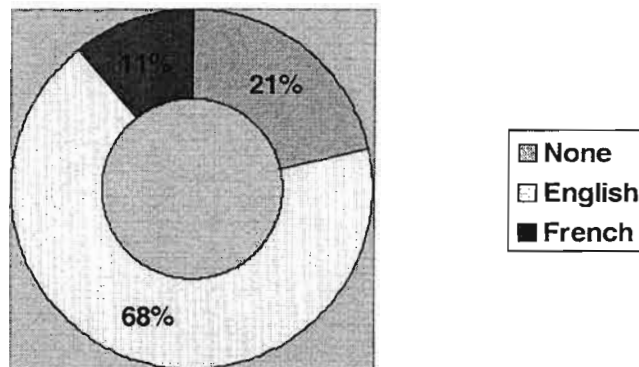


2. Location of first parties (as for most of the test cases, the second parties were fictional):



3. Cases that were stated to be cross-boarder: 25%

4. Language the process was conducted in:

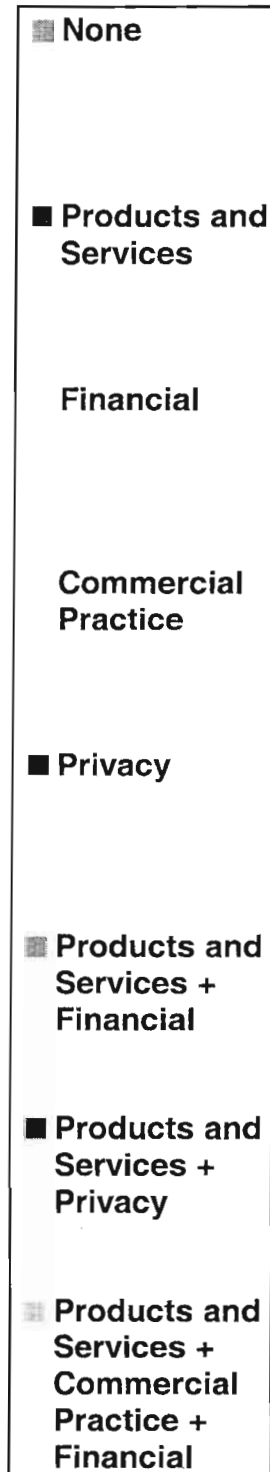
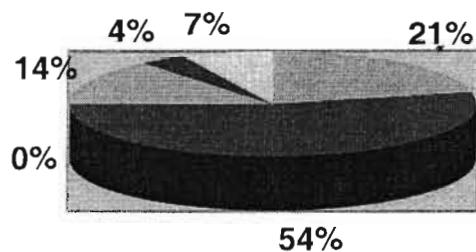


(Note: "None" represents cases where no proposal form was completed fully or at all, therefore language was not ascertainable)

5. Nature of documents uploaded during the process:

Test attachments: Documents were uploaded in 28.6% of the cases.

6. Nature of the dispute:

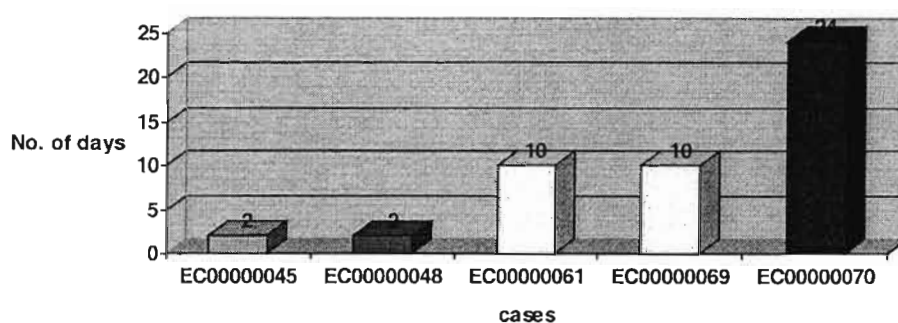


(Note: "None" represents cases where no proposal form was completed fully or at all, therefore the nature of the dispute was not ascertainable)

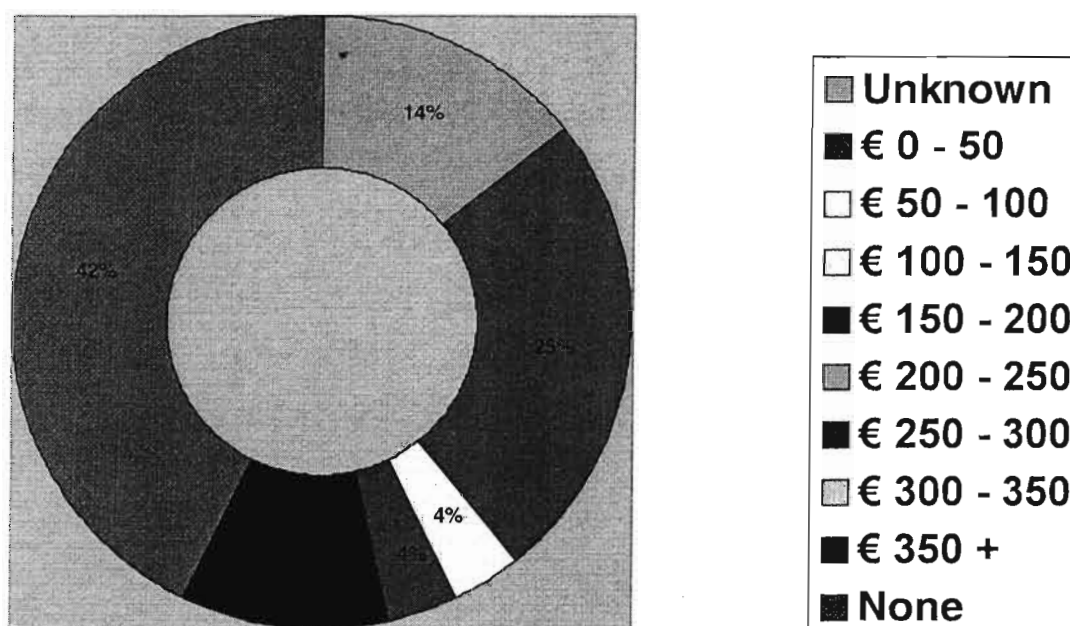
(Note: “None” represents cases where no proposal form was completed fully or at all, therefore the nature of the dispute was not ascertainable)

7. Cases that settled: 17.9%

8. Point at which a settlement was reached:



9. Monetary value of the transaction giving rise to the dispute:

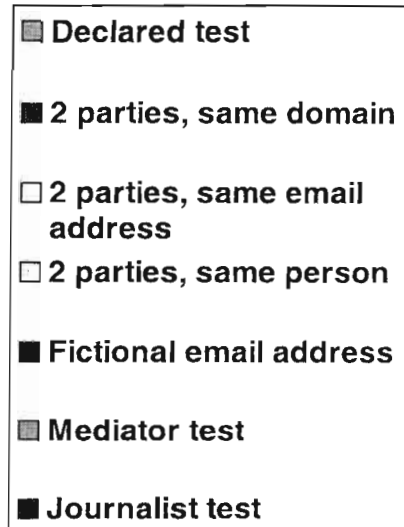
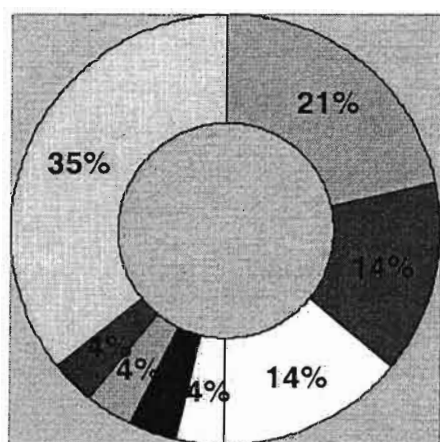


Note:

“Unknown” represents cases in which the monetary value of the transaction was unclear from the case details.

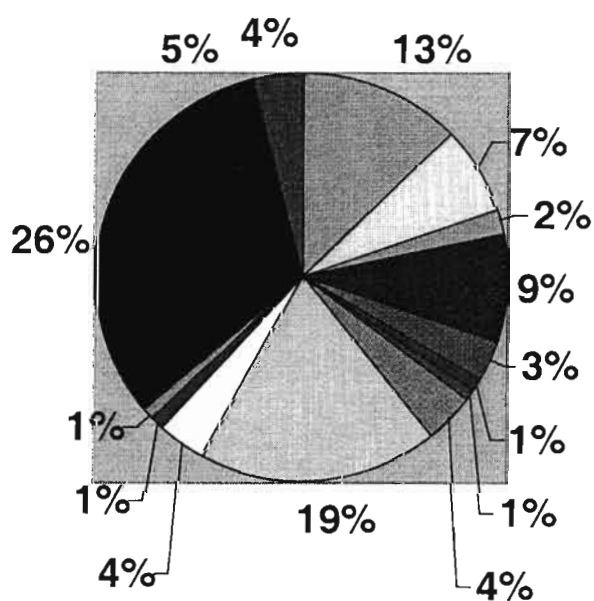
“None” represents cases that did not proceed beyond the case initiation stage and therefore contained no details on such things as monetary value, or cases filed in incoherent language.

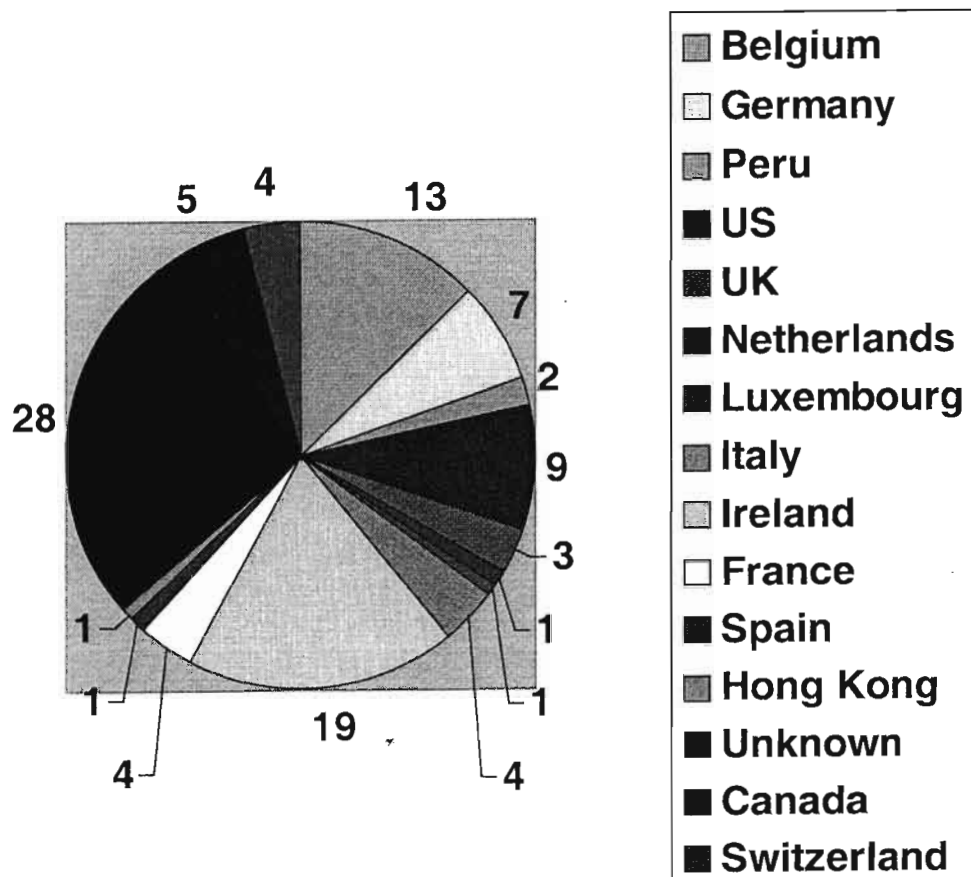
10. Reasons why the case is presumed to be a test:



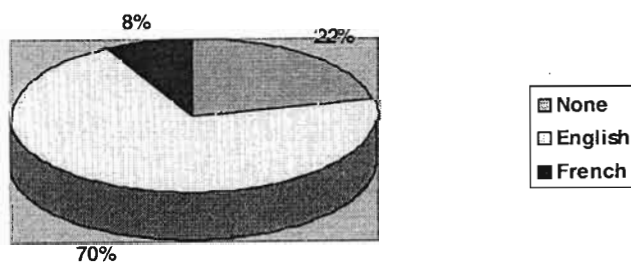
Combined Data

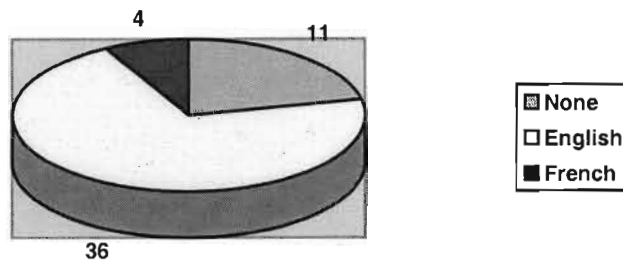
1. Location of all parties:





2. Languages all processes were conducted in:





2) Survey Responses of Mediator:

1) Where did you hear about ECODIR?

I must have heard of ECODIR about a year ago, when visiting web sites on ODR. Most likely in the ICC or the Université de Geneve or the ABA Task Force surveys. I decided to contact ECODIR after seeing some info on the E-Arbitration-T portal.

2) How much time did you spend mediating the case?

Case No. 66 took me about 8 hours, which is really a lot! I believe much time could have been saved if I had copied and pasted my planned messages on a Notepad or Word screen, working on them off line, before sending them through the ECODIR system. Otherwise much time will be used while logging in. (See my reply to question 5). I could have saved an additional hour, had I sent shorter - more informal - messages.

3) Did you have any difficulty communicating with the parties?

- None (I served on just one case). However both parties spoke German, and it was odd to force them into English. I can read and - to some extent - write in German. Perhaps I should have encouraged them to send their messages in German.

4) Did you have any difficulty understanding the site?

None

5) Did you have any difficulty navigating the site?

None. The site is well designed. Perhaps it allows for too short a time to read, plan, draft, save, modify and confirm messages, before it disconnects the participant,

6) Please provide any additional comments on the presentation of the site.

- I would suggest a more inviting look-and-feel. Both e-merchants and consumers will like to see appealing texts on the general characteristics of ECODIR, its robust structure and functioning. Especially after the free use of it is about to expire and a comparison with other competing ODRs will be unavoidable.

7) Did you contact the secretariat at any point? If so, for what reasons (technical, procedural etc.)?

- On one occasion I contacted the secretariat during the mediation because it is not quite clear on the site how and with what format the recommendation phase had to take place.

8) What remuneration would you expect to receive for your services in a future business implementation of ECODIR?

I would rather prefer to first have an idea of workload and flow of cases. In any case I would accept some more cases before raising the question of mediator fees.

9) What do you think of the name ECODIR?

ECODIR sounds great, and easy to pronounce and to remember for speakers of most common languages in the European Union. The acronym reminds more of "ecology" than of "B2C e-commerce dispute resolution", but that may be more an advantage than a flaw.

2. Appendix : Presentations Given and Bodies Visited

1.- UCD activities

Record of Presentation to CCform

Place: Brussels

Date: 20 March 2003

Present: Brian Hutchinson, Members of CCform Topic Panel 5

Key Points:

- Interest was expressed by all in the use of ECODIR as a complaints handling mechanism, as well as a dispute resolution mechanism.

Record of Presentation to Commissioner David Byrne

Place: Dublin Castle

Date: 13 June 2003

- Present: Commissioner Byrne; a colleague of the Commissioner; Ruth Burnside, Gibney Communications; Dean Paul O'Connor, Faculty of Law, UCD; Brian Hutchinson; Lesley Caplin; photographer.

Key Points:

- Commissioner Byrne did need to be “re-familiarised” with the project.
- He was extremely impressed with the platform and the project’s potential in the area of consumer protection.
- He noted that only 1% of cross-boarder transactions are actually made on the Internet and that there is a frequent misconception that this figure is much higher. He felt that ECODIR could provide a service where disputes arise in such situations, but should not be restricted to online transactions.
- He was particularly interested in the details of a future business implementation of the project.
- He immediately saw the need to have businesses on board.

- He concluded the meeting by asking if there was anything that he could do for ECODIR.

Record of Presentation to Consumers' Association of Ireland Ltd.

Place: 49 Upr. Mount st., Dublin 2

Date: 17 April 2003

Present: Dermott Jewell, chief executive; Brian Hutchinson; Lesley Caplin.

Key Points:

- Mr Jewell was aware of the project.
- He was generally impressed by ECODIR.
- He valued the fact that the consumer retained control of the process.
- He noted that consumers tend to want more than they originally contemplated seeking as a dispute develops, and commended the fact that ECODIR restricts this by requiring the consumer to detail his or her problems and demands at the outset.
- He stated that if the project is to extend beyond June he would be happy to notify it in his publication.

Record of Presentation to Duquesne Law School Summer Program

Place: Dublin

Date: 20 June 2003

Present: Brian Hutchinson, American law professors and students

Key Points:

- Participants in the program were impressed with the project.

Record of Presentation to European Consumer Centre, Dublin

Place: 13a Upper O'Connell st., Dublin 1

Date: 13 May 2003

Present: Tina Leonard, Manager; Staff (8); Brian Hutchinson; Lesley Caplin.

Key Points:

- They were aware of the project.
- They were generally impressed by ECODIR.
- They could see possibilities for referring disputes that they failed to resolve to ECODIR.
- They envisioned ECODIR being used as part of the EEJ-Net.
- They agreed to outline what ECODIR is to other interested parties.

Record of Presentation to the European Young Bar Association

Place: EYBA Annual Conference, Dublin

Date: 9 May 2003

Presentation: Online DR and the ECODIR project

Present: Representatives of all EYBAs

Key Points:

- Brian Hutchinson gave a very comprehensive presentation, outlining all aspects of the ECODIR project and ODR.
- The members of the association were in general impressed with the project

Record of Presentation to Fordham Law School Summer Program

Place: Dublin

Date: 9 July 2002

Present: Brian Hutchinson, American law professors and students.

Key Points:

- Participants in the program were impressed with the project.

Record of Presentation to the Irish Financial Services Regulatory Authority

Place: Central Bank, Dublin

Date: 3 June 2003

Present: Mary O'Dea, IFSRA director of consumer affairs; 2 members of her team; Brian Hutchinson.

Key Points:

- General interest in the project was expressed.
- The Director saw no major impediments to the use of ECODIR in financial services disputes.
- She recommended demonstrating ECODIR to the incoming ombudsman for financial services.

Record of Presentation to the Irish Internet Association

Place: IIA office, 43/44 Temple Bar, Dublin 2

Date: 18 June 2003

Present: Irene Gahan, a founding board member of IIA; Sinead Murnane, Operations Manager; Brian Hutchinson; Lesley Caplin.

Key Points:

- Both Irene and Sinead were aware of the project but did not have a deep knowledge of the details.
- They seemed impressed by what was demonstrated to them.
- Irene in particular noted the benefits of targeting associations. They both realised the need to get businesses on board.
- Sinead offered to mention ECODIR in the IIA's newsletter which goes out to 8000 IIA members.
- Irene suggested a number of other people who we should meet.

Record of Presentation to ISME

Place: 17 Kildare st., Dublin 2

Date: 8 May 2003

- Present: Jim Curran, head of research and information services; Brian Hutchinson; Lesley Caplin.

Key Points:

- Mr Curran was not aware of the project.
- He looked at ECODIR's possibilities from the point of view of the business as "consumer party" rather than as the "business-party".
- He was sceptical about ECODIR's possibilities for the businesses ISME represents due to the fact that ECODIR is binding only if the parties decide that it shall be.

Record of Presentation to the Luxembourg Ministry of Economic Affairs

Place: Luxembourg

Date: 18 March 2003

Present: Yves Pouillet, Hakim Haouideg, Brian Hutchinson, 3 Representatives from the Luxembourg Ministry of Economic Affairs

Key Points:

- Brian Hutchinson gave a comprehensive presentation, outlining all aspects of the ECODIR project and ODR.

- An in-depth discussion of the ODR-Luxembourg project took place.
- The representatives expressed interest in the use of ECODIR in the ODR-Luxembourg project.
- They made an invitation to participate and present ECODIR at the conference on trustmarks in Sept 2003.

Record of Presentation to the Office of Director of Consumer Affairs

Place: ODCA offices, 4 Harcourt Road, Dublin 2

Date: 12 June 2003

- Present: Carmel Foley, Director of Consumer Affairs; selected members of her team (8); Brian Hutchinson; Lesley Caplin.

Key Points:

- Brian Hutchinson gave a very comprehensive presentation, outlining all aspects of the ECODIR project.
- The Director was particularly interested in the consumer protection aspect and identified similarities between some ECODIR cases that were outlined and cases that had passed through her office.
- She identified the need for consumer confidence in the system as well as the need to have businesses on board.
- She concluded by offering to provide a link to ECODIR on the ODCA's website.

Record of Presentation to UNECE

Place: Geneva

Date: 6 – 7 June 2002

- Present: Brian Hutchinson, participants in the UNECE Forum on Online Dispute Resolution (experts in the field of ODR and interested parties).

Key Points:

- Brian Hutchinson presented a comprehensive paper on ECODIR which was published in the Forum's proceedings.

- Most were aware of the project.
- They were generally impressed by it.

Record of Presentation to UNECE

Place: Geneva

Date: 30 June – 01 July 2003

- Present: Brian Hutchinson, participants in the UNECE Forum on Online Dispute Resolution (experts in the field of ODR and interested parties).

Key Points:

- Brian Hutchinson presented a paper on ECODIR and regulatory challenges to ODR which was published in the Forum's proceedings.
- All were aware of the project.

2. CRID activities

1. New projects

The CRID has been trying to deepen its research on ODR systems by participating in various projects.

The CCform project

The CRID has been involved in the CCform project which is supported by the European Commission's Information Society Technologies programme (IST). The CCform project aims to develop an online, multilingual complaint form and a best practice business process. It started on the June 1 2002.

This project has emphasized the need of further research on several topics:

- the privacy issues;
- the different available legal techniques to insure the enforcement of the ODR outcomes;
- the relationship between complaints management systems and ODR providers;
- the need to have a well-drafted complaint form in the initial phase of the process.

The ODR-LUX project

The CRID is also currently conducting a study named “*creation of an ODR platform for consumer disputes resolution in Luxemburg*” for the Ministry of Economy.

This study is conducted jointly by the CRID with regards to the legal aspects and the Joint Research Centre of the European Commission with regards to the technical and economic aspects. It has begun in February 2003 and will end in March 2003.

To illustrate the functioning of an ODR platform, the Ecodir system has been presented as a possible model for online dispute resolution and received all the attention of the Ministry representatives.

This study will raise new questions such as:

- the role of the national states in promoting and developing ODR systems;
- the relationship between ODR providers and trust mark schemes (more precisely e-certification.lu);
- the potential relationship between an ODR platform and existing offline ADR's;
- the definition of the territorial scope of application for the national ODR platform;
- the opportunity to use the ODR platform to find a solution to a complaint launched by a citizen against a public service or institution.

The ODR-Belgium proposition

The CRID has proposed to conduct a study in the field of ODR on behalf of the Belgian Ministry of Economy based on its experience from the ECODIR project. The negotiations are not yet fulfilled.

The Quebecian proposal

In March 2002, ECODIR has been approached by the Quebecian Ministry of Consumer Affairs (Yolande Coté) in order to analyse to what extent ECODIR might be adapted to the Quebecian needs (Problem of translation – reference to the Quebecian legal framework). These discussions have been temporarily suspended due to the e-Resolution bankruptcy. Nevertheless, they have started again in mid 2003.

Yolande Coté has participated to various seminars organized on the ADR theme notably in the context of CCForm.

2. Participation in various events and meetings

1. Vincent Tilman : 1st **ECLIP II Workshop** on the Process of Internet Regulation: "Arbitration and mediation on line: the ECODIR project" (Namur, 7 June 2000)
2. Vincent Tilman : 1st **ECLIP European Summer School** on Legal Aspects of E-Commerce: "European consumer protection in the electronic marketplace" (2 October 2000, Palma de Mallorca)
3. Vincent Tilman : Brussels (Belgium), Joint Research Center, on presentation and discussion the plans of the JRC technology demonstrator project and exchanging of information on current EU funded ADR related projects, "**The ECODIR Project**" (12 October 2000)
4. Vincent Tilman : The Hague (Netherlands), **Joint Conference of the OECD, HCOPIL and ICC on Building trust in the online environment: Business to consumer Dispute Resolution**: "The preliminary request of an ADR mechanisms under development" (11 December 2000)
5. Vincent Tilman : **Training in IT-law for lawyers (JURITIC)** on Signature, codes de conduite, labels and Alternative Dispute Resolution: "La résolution des conflits en ligne" (16 February 2001, Namur)
6. Vincent Tilman presented the ECODIR project in the framework of a lecture given to students of the **Master on Intellectual Property and Information Technologies** organised by the University of Alicante (23 February 2001)
7. Yves Pouillet and Alexandre Cruquenaire presented the ECODIR project to **CEPANI** (Belgian Center for Mediation and Arbitration) on 22 March 2001. The meeting enables to discuss possible cooperation in the mediators panel management.
8. Anne Salaün, **ECLIP workshop on Alternative Dispute Resolution**: "The ECODIR project: Electronic Consumer Dispute Resolution" (Oslo, 20 April 2001).
9. Fabrice de Patoul presented the ECODIR project to a conference in Berlin organized by the consumer organization **Die Verbraucher Initiative** on 14 January 2002. ECODIR was presented from a practical point of view and the issue of enforcement of decisions and financing was also tackled.
10. Yves Pouillet and Alexandre Cruquenaire have given a presentation of the Ecodir Project to **INFOPOLE**, The network of partners for Information and Communication Systems in Wallonia on February 20 2002.
11. Alexandre Cruquenaire presented the ECODIR platform to representatives of both **Luxembourg Ministry of Economy and Luxembourg Chamber of Commerce** on 27 May 2002. The aim of the meeting was to discuss the interest for the Luxembourg government to join the ECODIR initiative or to inspire from it in the process of implementation of the e-commerce directive.

12. Alexandre Cruquenaire : « How do Online Dispute Resolution Systems work : the ECODIR case », contribution to the **Annual Congress of the International Federation of Computer Law Associations (IFCLA)**, 6-7 June 2002, Berlin.
13. Fabrice de Patoul presented the ECODIR project at a conference-meeting on ADR and Mediation organized by the **Bar of Brussels** on 8 June 2002. It was an opportunity to present the project to Belgian and European practitioners.
14. Alexandre Cruquenaire : "Le règlement extrajudiciaire des litiges liés au commerce électronique : Analyse de deux procédures", presentation made to the **Charleroi Young Bar Association** (29 October 2002, Charleroi)
15. **Visit of the Belgian King** at the University of Namur (Nov. 2002) : At the occasion of his visit at the University of Namur, ECODIR has been presented to the King Albert II, the members of his cabinet and the High authorities of the Walloon Region. It must be underlined that this presentation has been specifically requested by the King himself very interested by the problem of Internet consumers facing the global Information Society.
16. Meeting with the **Luxembourg Ministry of Economy** representatives (21 November 2002) : agreement to make a study on the implementation of an ODR possibly based on the ECODIR model in Luxembourg.
17. Yves Pouillet has participated to the **EMOTA conference** held at Brussels the 4th March 2003. He has chaired the morning session and presented a keynote speech : "How to create a trustful and credible Electronic Commerce Market ?" dedicated to the code of Trusted Third Parties.
18. Yves Pouillet has participated to the **EEJ Net conference** held at Brussels the 10th and 11th of June 2003. He has chaired the panel dedicated to the "ADR Regulatory issues" and presented a keynote speech entitled "Towards a trustful and credible 'ADR system' 5 issues to be addressed !
19. Christophe Lazaro has participated to the **UNECE Forum on Online Dispute Resolution** held in Geneva on June 30 and July 1 2003.
20. Hakim Haouideg intended to participate in the **International E-Commerce Trustmarks Congress** to be held in Luxembourg the 17th to 19th September 2003. He was registered to give a presentation on the "challenges for the creation of an ODR system at a national level". Meanwhile, this congress has been cancelled.
21. At the **MOVE Conference on Distance Selling in Europe : the Legal aspects**" held at Lille in the context of "Emalille" 6 and the 7th October 2003. Yves Pouillet will develop the following theme : "Self regulatory systems and e-confidence: the role of ADR and labelling systems".

3. Appendix : Mention of the ECODIR project in publications

Ecodir has contributed to the promotion of ODR services and has been analysed or cited in various publications.

- Consumers International, "Disputes in Cyberspace 2001: update of online dispute resolution for consumers in cross-border disputes", Office for Developed and Transition Economies, November 2001.

Different actions of dissemination were undertaken in order to promote the Ecodir platform. A press meeting was organized during the launching conference.

A. Traditional medias

1. Television /Radio

TV broadcast on CANAL (Local TV in Namur –Belgium), 29/10/2001

- Radio broadcast « La première – RTBF » (Belgian national radio), 14/11/2001
- Radio broadcast « Fréquence Wallonie » (Belgian local radio), 05/12/2001

2. Newspapers/ Magazines

- article in "Trends Tendances" (belgian economic magazine) 01/11/2001 "un cybermédiateur européen pour l'e-commerce"
- article published in "La Libre Belgique" (Belgian national newspaper) 02/11/2001 "Un nouveau cybertribunal"
- article published in "Vers l'Avenir" (local belgian newspaper) 03/11/2001 "Juge pour achats online"
- article published in Frankfurter Allgemeine Zeitung (german newspaper) 03/11/2001

B. Medias on-line

- <http://www.silicon.de> 27/06/2001 under the topic "politiques and e-law".
- http://www.laviedunet.be/Internauts/A_01DD8E.asp 10/11/2001 « Un médiateur virtuel pour le web »
- <http://www.espacecom.com/hebdo/articlecomplet.asp?IdArticle=1473> 31/10/2001
« *eResolution participe au site européen ECODIR* »
- <http://www.mmedium.com/cgi-bin/nouvelles.cgi?Id=5932> 26/10/2001 « Un pas de plus vers un tribunal du commerce électronique »
- <http://www.e-comlaw.com>
- <http://www.odrnews.com/> 4/02/2002
- <http://www.ombuds.org/center/aaron/adronline2001/12/patrikios.htm>
26/10/2001 "ODR in Europe: The Launch of the Electronic Consumer Dispute Resolution Project"
- <http://www.ADRworld.com> 31/10/2001 "First European electronic consumer ADR service launched"

C. Official documents

- *Disputes in cyberspace 2001 update of ODR for consumers in cross-border disputes*
11/2001 Consumers international (Office for developed and transition economies)

Another proof that Ecodir has contributed to the promotion of ODR services is that a simple search on an Internet search engine with the word ECODIR brings more than 1.300 results among which more than 320 are articles or studies in the "Portable Document Format".

4. Appendix : Publication : le développement des modes alternatifs de règlement des litiges de consommation : quelques réflexions inspirées par l'expérience ECODIR

Le 26 octobre 2001, à Bruxelles, était officiellement lancée la plate-forme de résolution des litiges "ECODIR" (Electronic CONsumer DISpute Resolution), accessible à l'adresse < <http://www.ecodir.org> >.

Quelques mois plus tard, la publication de ce numéro spécial de Lex Electronica nous offre l'opportunité de rappeler d'où vient cette plate-forme et quel est son fonctionnement.

Il convient en effet de revenir tout d'abord sur la genèse de cette plate-forme ECODIR et donc sur le projet de recherche du même nom (I.).

Nous examinerons ensuite le fonctionnement de la plate-forme. (II.).

Enfin, nous mettrons en exergue certains éléments d'analyse qui nous sont apparus intéressants dans le cadre de l'exploitation de la plate-forme ECODIR (III.).

I. Le développement de la plate-forme: le projet ECODIR

ECODIR a d'abord vu le jour en tant que projet de recherche cofinancé par l'Union européenne¹⁹. Le contrat de recherche porte sur une période de deux années (juin 2000-juin 2002). Un consortium international mené par le Centre de Recherches Informatique et Droit (CRID)²⁰ des Facultés universitaires de Namur (Belgique) a ainsi été à la base de la création de la plate-forme de résolution des litiges. Ce consortium comprenait principalement le Centre de Recherches en Droit Public (CRDP) de l'Université de Montréal²¹, le Centre pour la coopération juridique internationale (CECOJI) du CNRS français²², la société canadienne e-Resolution²³ et la Cellule Interfacultaire de Technology Assessment (CITA)²⁴ des Facultés de Namur. Ont également participé aux travaux: l'Université de Munster (Allemagne)²⁵, l'Université des Balléares²⁶, la société belge Globalsign²⁷, le Centre de Médiation et d'Arbitrage de la Chambre de Commerce de Paris (CMAP)²⁸ et la société américaine Online Resolution²⁹. La société irlandaise Arbitration of International Disputes Ltd (AIDL) a rejoint ensuite le consortium dans le cadre de l'exploitation de la plate-forme.

La démarche se voulait tout d'abord universitaire, par la réalisation d'une étude de faisabilité. Cette étude a permis d'identifier un certain nombre de contraintes socio-économiques, juridiques et techniques, qui ont guidé la détermination du type de procédure à offrir.

¹⁹ Sur un budget global d'environ 500.000 EUR, la contribution de l'Union européenne est de 250.000 EUR.

²⁰ Voy. < <http://www.crid.be> >.

²¹ Consulter < <http://www.crdp.umontreal.ca> >.

²² Voy. < <http://www.ivry.cnrs.fr> >.

²³ < <http://www.eresolution.com> >.

²⁴ < <http://www.info.fundp.ac.be/~cita> >.

²⁵ Cf. < <http://www.uni-muenster.de/Jura.itm/hoeren> >.

²⁶ < <http://www.uib.es/depart/dpr/ingles/cedibang.html> >.

²⁷ < <http://www.globalsign.com> >.

²⁸ < <http://www.cmap.asso.fr> >.

²⁹ < <http://www.onlineresolution.com> >.

Sur base des conclusions de cette étude, le consortium, s'appuyant sur le savoir-faire de e-Resolution en la matière, a pu développer une plate-forme de résolution en ligne de certains litiges de consommation.

II. Le fonctionnement de la plate-forme ECODIR

A. Un objet limité

Compte tenu de l'objet du contrat de recherche proposé par la Commission européenne et de certaines contraintes juridiques identifiées dans la phase préliminaire du projet, la plate-forme ECODIR s'est vue assigner un objet limité.

Elle ne couvre ainsi que les conflits impliquant au moins un consommateur et relatifs à une transaction effectuée en ligne. Cette restriction a été dictée par le contrat conclu avec la Commission européenne.

La procédure ECODIR ne constitue nullement une procédure d'arbitrage. Elle ne prive en effet pas les parties de la possibilité d'ester en justice. Dans la mesure où le projet portait sur les (petits) litiges de consommation, il n'était pas réaliste de vouloir mettre en place un système d'arbitrage. L'offre de ce type de services via l'internet pose d'importants problèmes juridiques qui nécessitaient des études approfondies que les ressources budgétaires du projet ne permettaient pas de financer, et ce d'autant moins qu'il n'aurait pas été possible de répercuter ces coûts sur les utilisateurs s'agissant en l'espèce de litiges d'importance économique mineure. La circonstance que le projet couvrait uniquement les litiges de consommation aggravait ce problème potentiel car les règles impératives sont nettement plus nombreuses dans ce domaine particulier du droit. La piste de l'arbitrage s'est donc assez rapidement révélée inadéquate.

Afin de permettre un développement rapide de la plate-forme, il a également été décidé d'écarter de son champ d'application certains types de litiges qui nécessitent également la prise en compte de contraintes juridiques très importantes, tels que ceux afférents à la fiscalité ou au droit de la famille³⁰.

La plate-forme a donc vu son champ d'application restreint, afin de garantir une mise en place effective dans les délais contractuellement prévus. Une éventuelle extension de ce champ fera l'objet d'une réévaluation en fin de projet.

B. Un système à trois étapes successives

Une fois l'hypothèse de l'arbitrage écartée, c'est donc une plate-forme de médiation qui a été mise sur pied. Elle comporte trois étapes qui sont successivement activées, en fonction du résultat de l'étape précédente.

Il y a tout d'abord une phase dite de "négociation", ensuite, une phase de "médiation" et, enfin, une phase de "recommandation".

³⁰ Article 1.2 « Les conflits relatifs aux contenus illicites sont exclus du champ d'application tout comme sont exclus les conflits relatifs aux dommages corporels, aux problèmes familiaux, financiers, d'imposition et de propriété intellectuelle. »

Précisons encore que le processus dans son ensemble repose entièrement sur la bonne volonté des parties qui ne peuvent être contraintes ni de participer à la procédure ni de veiller à son aboutissement. Cette grande souplesse constitue également une des principales faiblesses de la plate-forme ECODIR telle qu'elle existe actuellement.

1) la phase de négociation

Dans un premier temps, le consommateur adresse une réclamation via la plate-forme ECODIR. Pour ce faire, il est invité à remplir en ligne certaines cases visant à s'identifier³¹ donner une brève description du problème rencontré. Le consommateur est ensuite invité à émettre une proposition de solution.

Le système informatique gérant la plate-forme ECODIR reçoit les informations du consommateur. Il crée une page sécurisée reprenant toutes les informations relatives au litige et adresse alors au commerçant concerné une notification par courrier électronique lui signalant qu'une plainte a été introduite à son encontre via la plate-forme ECODIR.

Le commerçant qui désire participer à la procédure va activer un hyperlien se trouvant inclus dans le mail de notification et sera, de ce fait, directement conduit dans la page dédiée au litige.

Le commerçant est ensuite invité à prendre connaissance de la plainte et la proposition formulée par le plaignant. Il peut l'accepter, la refuser ou formuler une contre-proposition. L'échange se poursuit avec le consommateur tant qu'une solution ne recueille pas l'assentiment des deux parties.

Si un accord est trouvé, le secrétariat ECODIR envoie un courrier électronique aux deux parties reprenant les termes de l'accord et les invitant à y adhérer de manière solennelle.

Si, à l'échéance d'une période de dix-huit jours, aucune solution ne se dégage, le secrétariat ECODIR invite les parties à solliciter la désignation d'un médiateur.

2) La phase de médiation

Si les parties le souhaitent, un médiateur est désigné par le secrétariat. La localisation des parties ainsi que leurs langues respectives sont prises en considération à cet égard. La phase de médiation commence le jour où le médiateur est désigné.

Le médiateur a accès au site sécurisé de l'affaire pour étudier l'information, les solutions déjà proposées et les arguments échangés par les parties durant la phase de négociation.

Le médiateur invite les parties à communiquer entre elles, à échanger des documents et à discuter de leur positions respectives.

En fonction des éléments rapportés par les parties, le médiateur énonce une série de solutions qui lui paraissent appropriées. Il invite les parties à réagir.

³¹ Selon une procédure sécurisée afin de garantir la confidentialité des informations divulguées ou reçues par la suite.

Si les parties se mettent d'accord sur l'une des solutions avancées par le médiateur, elles sont invitées par le secrétariat à formaliser leur accord dans un contrat.

Si aucun accord ne se dégage après quinze jours, le médiateur ne peut que constater l'échec de son intervention.

3) La phase de recommandation

Le médiateur, après avoir constaté cet échec, émet une recommandation motivée dans les quatre jours suivant le début de la phase de la médiation. La recommandation consiste à dévoiler la solution qui, selon lui, est la plus adéquate.

Cette recommandation n'est pas contraignante pour les parties. Elle peut seulement l'être si les parties se sont accordées au début du processus sur ce caractère contraignant.

Les parties disposent de sept jours pour accepter la recommandation finale du médiateur. Dans ce cas, cette dernière constitue l'accord et est formalisé par un écrit qui est envoyé aux parties.

C. Autres éléments intéressants

Le recours à la procédure ECODIR est gratuit jusqu'en fin juin 2002 (période couverte par l'intervention de l'Union européenne). La participation financière des parties devra alors faire l'objet d'une évaluation.

Le rôle du médiateur est d'assister les parties de manière indépendante et impartiale. Le règlement d'ECODIR indique qu'il est guidé par les principes de justice et d'équité. Il doit pour accomplir sa tâche prendre en considération les droits et obligations des parties ainsi que les circonstances entourant le conflit. En outre, le médiateur s'engage à ne pas agir en tant que représentant ou conseiller d'une partie dans des procédures arbitrales ou judiciaires relatives au conflit en question. Par ailleurs, un système de remplacement du médiateur est mis en place en cas de décès, incapacité ou démission acceptée par le secrétariat. Cependant, les parties peuvent décider d'être assistées et représentées par les personnes de leur choix.

Enfin, il est à noter que la confidentialité est une des caractéristiques primordiales sur laquelle se base le mode de résolution de conflits instauré par ECODIR. En effet, la confidentialité s'étend non seulement à l'accord qui interviendrait mais également à tous les processus nécessaires pour y parvenir. Ainsi, les correspondances échangées, les propositions de solution ou les informations partagées entre les parties, le médiateur et le secrétariat seront gardées confidentielles.

III. Quelques éléments d'analyse

A. Premier bilan du fonctionnement de la plate-forme

Au moment d'écrire ces lignes, la brève exploitation de la plate-forme ECODIR ne permet pas encore de tirer des conclusions sur de nombreux points. Certains enseignements s'en dégagent toutefois et pourront être mis à profit pour la poursuite de l'expérience.

La réussite d'un projet de ce type requiert des moyens de publicité assez considérables. Le budget de fonctionnement d'ECODIR est trop étroit pour permettre une politique de marketing ambitieuse. Il convient dès lors de privilégier une approche ciblée, en direction des parties les plus susceptibles de recevoir et, surtout, de prendre en compte le message. Les premiers cas soumis ont en effet montré une certaine réticence des commerçants à participer au processus, ce qui témoigne indéniablement d'un manque d'information dans la mesure où ce processus n'est absolument pas contraignant pour les parties.

Le développement autonome d'un système d'ADR, sans participation directe des acteurs économiques, permet de garantir un niveau maximal d'indépendance, mais nécessite des efforts permanents de communication pour amener les parties en litige à soumettre leur différend à ECODIR. Il nous semble donc évident que des synergies doivent être trouvées avec des associations de commerçants et/ou de consommateurs, afin qu'une référence automatique soit faite vers la plate-forme ECODIR.

Il semble également souhaitable de coupler l'ADR à un système de labellisation, afin de trouver un moyen d'assurer une mise en œuvre des accords ou recommandations émanant d'ECODIR. En effet, le label permettrait de contraindre contractuellement les commerçants adhérents à exécuter les solutions trouvées via la plate-forme ECODIR.

Le système de labellisation s'articule souvent avec l'établissement d'un code de conduite. L'émergence des codes de conduite au sein du commerce électronique vise à répondre au besoin de régulation face au contexte sans cesse évolutif et polymorphe de la société de l'information. En outre, le code de conduite s'inscrit dans la même démarche volontaire et concertée que l'ADR. ECODIR trouverait ainsi naturellement sa place comme processus de résolution de conflit dans l'application et le respect du code de conduite. Le label, le code de conduite et un ADR tel qu'ECODIR seraient en mesure de remplir ce besoin de sécurité dont manque le commerce électronique, et cela, grâce à des instruments souples et basés sur la bonne volonté des parties.

B. Quelques questions juridiques

Le cadre légal dans lequel s'inscrit la plate-forme ECODIR soulève certaines interrogations sur le plan juridique.

1) Incidence des recommandations européennes en la matière ?

La Commission européenne a édicté deux recommandations relatives aux mécanismes extrajudiciaires de résolution des litiges de consommation : la recommandation 98/257/CE concernant les principes applicables aux organes responsables pour la résolution extrajudiciaire des litiges de consommation³² et la recommandation 2001/310/CE relative

³² Recommandation 98/257/CE de la Commission du 30 mars 1998 concernant les principes applicables aux organes responsables pour la résolution extrajudiciaire des litiges de consommation, *J.O.C.E.*, n° L 115 du 17 avr. 1998, p. 31.

aux principes applicables aux organes extrajudiciaires chargés de la résolution consensuelle des litiges de consommation³³.

Les champs d'application matériels respectifs des deux recommandations ne sont pas clairement définis. Des imprécisions subsistent en effet dans les textes.

Le considérant n° 8 de la recommandation 98/257/CE dispose que “la présente recommandation doit se limiter aux procédures qui, indépendamment de leur dénomination, mènent à un règlement du litige par l'intervention active d'une tierce personne qui propose ou impose une solution ; que, par conséquent, ne sont pas visées les procédures qui se limitent à une simple tentative de rapprocher les parties pour les convaincre [de] trouver une solution d'un commun accord”.

Le considérant n° 9 de la recommandation 2001/310/CE précise pour sa part que “[l]es principes fixés dans la présente recommandation ne portent pas atteinte à ceux établis dans la recommandation 98/257/CE de la Commission qui devraient être respectés par les procédures extrajudiciaires qui, indépendamment de leur dénomination, mènent à un règlement du litige par l'intervention active d'une tierce personne qui propose ou impose une solution contraignante ou pas à l'égard des parties. Les présents principes devraient être respectés par toute autre procédure menée par une tierce personne qui, indépendamment de sa dénomination, facilite la résolution d'un litige de consommation en rapprochant les parties pour les convaincre de trouver une solution d'un commun accord, par exemple en proposant de manière informelle des possibilités de règlement. Les principes se limitent aux procédures de résolution des litiges de consommation qui sont destinées à remplacer les procédures judiciaires. Sont, par conséquent, exclus les services de réclamation des consommateurs gérés par une entreprise et fournis directement au consommateur ou les cas où une tierce personne assure ce service pour l'entreprise ou en son nom, étant donné qu'ils relèvent des discussions généralement menées entre les parties avant la naissance d'un litige qui serait soumis à un organe tiers responsable de la résolution des litiges ou à un tribunal”.

Il semble donc que ce soit la nature active ou non du rôle du tiers qui détermine l'application de l'un ou l'autre des deux textes. Si le rôle du tiers est actif (consistant à proposer ou imposer une solution), la recommandation 98/257/CE s'appliquera. Par contre, si ce rôle est passif (consistant à rapprocher les parties et à les convaincre de trouver une solution de commun accord), il conviendra de prendre en compte les dispositions de la recommandation 2001/310/CE.

La détermination de la nature du rôle du tiers intervenant n'est cependant pas toujours évidente. En effet, la distinction entre “proposer une solution” (intervention régie par la rec. 98/257/CE) et “proposer de manière informelle des possibilités de règlement” (intervention soumise à la rec. 2001/310/CE) est loin d'être claire, particulièrement dans le contexte de procédures de type médiation³⁴, telles que celles proposées par ECODIR.

³³ Recommandation 2001/310/CE de la Commission du 4 avril 2001 relative aux principes applicables aux organes extrajudiciaires chargés de la résolution consensuelle des litiges de consommation, *J.O.C.E.*, n° L 109 du 19 avr. 2001, p. 56.

³⁴ Sur la distinction entre les différents types de mécanismes de résolution des litiges, cf. P. DE LOCHT, “Les modes de règlement extrajudiciaire des litiges”, in *Le commerce électronique européen sur les rails ?*, *op. cit.*, p. 328 et s., n°s 615-627.

Cette difficulté de délimitation des champs d'application respectifs des deux recommandations n'est pas sans incidence pratique dans la mesure où certains principes de la recommandation 98/257/CE sont susceptibles de poser des problèmes en matière de médiation.

La recommandation 98/257 consacre sept principes : indépendance, transparence, contradictoire, efficacité, légalité, liberté et représentation.

Elle insiste sur le respect du principe du contradictoire qui implique "la possibilité, pour toutes les parties concernées, de prendre connaissance de toutes les positions et de tous les faits avancés par l'autre partie ainsi que, le cas échéant, des déclarations des experts". Ce principe contrarie fortement les exigences inhérentes à un processus de médiation. En effet, les parties à un tel processus doivent pouvoir confier des éléments au médiateur sans que ce dernier ne les révèle à l'autre partie. A défaut, le processus risque de ne pas fonctionner dans la mesure où les parties ne s'y impliqueront pas complètement, par crainte que des éléments révélés au médiateur ne puissent être divulgués à l'autre partie et utilisés ultérieurement contre elles³⁵.

En outre, selon la recommandation, les solutions extrajudiciaires ne peuvent priver le consommateur de la protection offerte par les règles impératives de la loi de l'Etat sur le territoire duquel il est domicilié dans les cas prévus par l'article 5 de la convention de Rome sur la loi applicable aux obligations contractuelles. Ici encore, la recommandation se heurte à la conception traditionnelle de la médiation qui vise à dégager des solutions qui rencontrent les intérêts des parties plutôt que de consacrer leurs droits.

La recommandation 2001/310 consacre le principe de l'équité (principe D). Ce principe implique différentes obligations à charge des organes de résolution des litiges.

Ainsi, ce principe permet aux parties de soumettre au tiers intervenant des éléments d'information, des pièces ou des arguments sur une base confidentielle. Cette conception de l'équité de la procédure est plus en phase avec les préoccupations des parties souhaitant participer à un processus de médiation.

En outre, l'équité de la procédure (point 2, b, du principe D) requiert que le consommateur soit informé, avant de donner son consentement à une proposition d'accord, du fait que les solutions proposées pourraient être moins favorables que celles résultant de l'application de la loi par un tribunal. En d'autres termes, le tiers intervenant n'est pas, dans sa recherche d'une solution, limité par la prise en compte de toutes les règles légales impératives potentiellement applicables. Ici encore, le principe est bien adapté à la réalité de la médiation qui n'a pas pour objet de consacrer des droits mais davantage de veiller à la rencontre des intérêts respectifs des parties en litige.

La recommandation 2001/310 est donc nettement mieux adaptée à la médiation que la recommandation 98/257.

³⁵ A ce propos, voy. notamment P. VAN LEYNSEELE et F. VAN DE PUTTE, "Médiation: confidentialité et responsabilité", *J.T.*, 1999, p. 254 et s.

Les incertitudes relatives à la délimitation des champs d'application respectifs ne permettent malheureusement pas de trancher clairement pour l'application de l'une ou l'autre des recommandations en ce qui concerne la plate-forme ECODIR.

2) Incidence de la directive européenne sur le commerce électronique.

La directive 2000/31/CE sur le commerce électronique³⁶ s'applique à « tous les services de la société de l'information ».³⁷ Les prestataires de service qui entrent dans le champ de cette directive sont tenus de respecter un certain nombre d'obligations liées à des garanties de transparence et d'information sur les réseaux. Ces obligations rejoignent ainsi un des objectifs des A.D.R. qui est de gagner la confiance des utilisateurs vis-à-vis du commerce électronique.

Dans un premier temps, il y a lieu de voir dans quelle mesure ECODIR entre dans la catégorie de prestataire de service de la société de l'information aux yeux de la directive. Ensuite, nous ferons un rapide tour d'horizon des obligations auxquelles ECODIR est susceptible d'être soumis. Dans tous les cas de figure, n'importe quel prestataire de service a intérêt à rencontrer les exigences de la directive en matière d'information et de transparence pour s'assurer la confiance de ses clients et la sécurité juridique de la transaction. Cela s'avère d'autant plus crucial pour une méthode alternative de résolution de conflit qui œuvre précisément dans ce sens.

a. Le champ d'application de la directive commerce électronique.³⁸

1. « Service dans la société de l'information ».

Il convient d'examiner, d'abord, si le service fourni par ECODIR entre dans le champ de la notion de « service de la société de l'information » tel que définit dans la directive. C'est autour de ce concept central que s'articuleront, ensuite, les notions de « prestataire » et « destinataire » de service de la société de l'information.

La définition du service est à reprendre de la directive 98/34/CE du 22 juin 1998 du Parlement européen et du Conseil prévoyant une procédure d'information dans le domaine des normes réglementaires techniques, telle que modifiée par la directive 98/48/CE du 20 juillet 1998 du Parlement européen et du Conseil.³⁹ Il s'agit de « tout service presté normalement contre rémunération, à distance, par voie électronique et à la demande individuelle d'un destinataire de services ».

Différents éléments de la définition entrent en ligne de compte pour apprécier si ECODIR accomplit un tel service. Certains éléments sont facilement rencontrés par ECODIR et ne méritent pas d'examen particulier. Ainsi, il ne fait pas de doute que le processus de résolution de conflits ECODIR se réalise « à distance » dans la mesure où cette condition est rencontrée dès qu'un service est « fourni sans que les parties soient simultanément

³⁶ Directive 2000/31/CE du Parlement européen et du Conseil du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, *J.O.C.E.*, 17 juillet 2000, L 178/1 à 16.

³⁷ Voy. cf. M. ANTOINE, « L'objet et le domaine de la directive sur le commerce électronique », in *Le commerce électronique européen sur les rails ?*, op. cit., p. 1 et s., n^{os} 1-75.

³⁸ M. ANTOINE, « L'objet et le domaine de la directive sur le commerce électronique », in *Le commerce électronique européen sur les rails ?*, op. cit., p. 2 et s., n^{os} 2 et s.

³⁹ Directive 98/48/CE du Parlement européen et du Conseil du 20 juin 1998, *J.O.C.E.*, n^o L 217 du 5 août 1998, p. 18.

présentes ».⁴⁰ De même, l'exigence que le service soit presté « par voie électronique » est remplie par ECODIR car ce vocable recouvre toute voie de télécommunication et notamment internet.⁴¹ Cette méthode alternative de résolution de conflits tire sa force précisément de l'utilisation de ces nouvelles technologies et de l'automatisation par voie électronique de la procédure. Notons qu'une méthode alternative de conflits qui utiliserait la téléphonie vocale, par exemple, pour la consultation d'un médiateur, ou comme moyen de conciliation entre les parties, n'entrerait pas dans le champ d'application de la directive.⁴² Enfin, ECODIR fournit bien un service « à la demande individuelle d'un destinataire de services ». Le consommateur fait appel de manière individuelle à un service de résolution de conflit.

Un élément de la définition mérite de retenir notre attention, il s'agit de la question de la rémunération. Cette notion est interprétée largement dans l'exposé des motifs de la directive et par la jurisprudence de la Cour de justice de la communauté européenne sur l'article 50 du Traité CE qui définit la notion de « service ». Ainsi, l'expression « service presté normalement contre rémunération » peut englober une activité ayant « un caractère économique » ou bénéficiant d'une « contrepartie économique ».⁴³ Le système ECODIR est gratuit jusqu'en juin 2002 mais après un système de rétribution devra être mis en place. Comme nous l'avons signalé par ailleurs, plusieurs pistes sont envisagées : financement public, partenariat avec des organisations de commerçants, ... ECODIR exercera dès lors une activité avec une contrepartie économique.

Cependant, il nous faut encore examiner les cas d'exclusions de la notion de service évoqué par la directive. Ainsi, le considérant 19 de la directive 98/48/CE considère que le critère de rémunération fait défaut « dans les activités que l'Etat accomplit sans contrepartie économique dans le cadre de sa mission, notamment dans les domaines social, culturel, éducatif et judiciaire; que de ce fait les règles nationales concernant ces activités ne sont pas couvertes par la définition prévue à l'article 50 du Traité et ne rentrent donc pas dans le champ d'application de la présente directive ». Par conséquent, sont exclus de la notion de « service », les services fournis par l'Etat dans le cadre des activités liées à l'exercice de la justice. Cette hypothèse est intéressante dans le cas où ECODIR serait repris par l'Etat ou un autre pouvoir public, à titre de service public à l'égard du consommateur. On pourrait envisager qu'il s'agit d'une activité du domaine judiciaire de l'Etat qui n'est pas couvert par la définition de « service ». Cependant, il est clair que cette exclusion visait avant tout l'activité des cours et tribunaux qui est entourée des prescriptions légales.

2. Prestataire de services de la société de l'information.

« Toute personne physique ou morale qui fournit un service de la société de l'information ». ECODIR est prestataire de services de la société de l'information dans la mesure où sa plate-forme fournit un « service de règlement de conflits » en ligne. Cette notion de prestataire de service est fort étendue car elle recouvre tous les types de services tels que définis précédemment.

⁴⁰ Article 1^{er}, § 2, 1^{er} de la directive 98/48/CE.

⁴¹ Article 1^{er}, § 2, 2^o tiret, de la directive 98/48/CE.

⁴² Annexe V, point 2, 3^o tiret, de la directive sur les services.

⁴³ Arrêt du 27 Septembre 1988, affaire *Humbel*, 263/86, point 17. Arrêt du 7 Décembre 1993, affaire *Wirth*, 109/92, point 15.

3. Destinataire du service.

« Toute personne physique ou morale qui, à des fins professionnelles ou non, utilise un service de la société de l'information, notamment pour rechercher une information ou la rendre accessible ». Cette notion large englobe non seulement le consommateur dans un rapport *Business to Consumer* mais aussi les rapports entre professionnels.

b. Les obligations du prestataire de service en matière d'information et de transparence.⁴⁴

En tant que prestataire de service de la société de l'information, ECODIR se voit imposé de fournir une série de renseignements ainsi que la mise en œuvre de mesures techniques spécifiques. Tout d'abord, elle est soumise à une obligation générale d'information qui vise tous les prestataires de service et, ensuite, en fonction des activités qu'elle entreprend, elle devra fournir des informations spécifiques.

1. Obligation d'information générale.

L'article 5 de la directive commerce électronique impose un socle minimal d'informations à donner pour tous les prestataires de service. Sans entrer dans le détail, il convient de distinguer deux grandes catégories d'obligations.

D'une part, les informations relatives au prestataire et à son activité qui comprennent notamment le nom du prestataire de services, l'adresse géographique à laquelle il est établi et les coordonnées du prestataire, y compris son adresse électronique.⁴⁵ Ces dernières informations doivent permettre d'entrer en contact rapidement, et de communiquer directement et efficacement avec le prestataire. En outre, chaque Etat a la possibilité de soumettre les prestataires à des obligations d'informations supplémentaires à ce socle minimal constitué par l'article 5. Les modalités d'accès à ces informations sont réglées par la directive qui précise que l'accès doit être facile, direct et permanent. Par exemple, un lien hypertexte facilement accessible vers une page contenant ces informations remplit cette dernière exigence.

La deuxième catégorie d'obligations concerne les prix. Cette hypothèse reste théorique dans la mesure où ECODIR est gratuit et devra le rester pour le consommateur. Toutefois, selon le modèle économique adopté, ECODIR pourrait devenir payant pour chaque utilisation par un commerçant ou une association de commerçants. Dans ce cas, il faudra considérer si le prix sera établi pour chaque service ou sous forme d'une licence. Les prix devront dès lors être indiqués de manière claire et non ambiguë, ainsi qu'avec les taxes incluses.

2. Autres obligations.

La directive sur le commerce électronique prévoit encore d'autres types d'obligations spécifiques d'informations selon les activités entreprises par le prestataire de service. Ainsi, l'article 6 prévoit des principes d'identification dans les communications commerciales qui

⁴⁴ M. DEMOULIN, "Information et transparence sur les réseaux", in *Le commerce électronique européen sur les rails ?*, op. cit., p. 95 et s., n^{os} 177 et s.

⁴⁵ En outre, le prestataire de services doit indiquer le registre de commerce où il est inscrit, son numéro d'immatriculation, les coordonnées de l'autorité de surveillance si son activité est soumise à autorisation, le numéro de TVA et . Ces mentions sont souvent exigées dans d'autres législations.

font partie d'un service de la société de l'information. D'autres obligations d'information pèsent encore sur le prestataire de services qui conclut des contrats par la voie électronique. Telle n'est pas la situation d'ECODIR pour l'instant qui se contente pour l'instant de faciliter un processus de médiation entre deux parties.

L'hypothèse d'une utilisation au cas par cas d'un commerçant d'un système ECODIR devenu payant ne sera pas envisagé ici. Nous renvoyons aux études spécifiques sur le sujet des contrats conclus par voie électronique.

3) Portée des solutions dégagées via ECODIR

Il convient de distinguer les différents types de solutions qui peuvent découler d'un mode de règlement de conflit tel qu'ECODIR. En effet, un accord peut intervenir à chaque étape de la procédure. Tout d'abord, lors de la négociation, une solution proposée par l'une ou l'autre partie peut être jugée raisonnable et acceptée par l'autre partie. Ensuite, lors de la phase suivante, avec l'aide du médiateur, les parties peuvent aboutir à une solution commune. Cette entente est formalisée par un accord écrit préparé par le médiateur. Enfin, lors de la dernière phase, le médiateur émet une recommandation. Le règlement ECODIR précise qu'« à moins qu'il n'en soit valablement reconnu autrement entre les Parties, la recommandation *n'engage pas* les parties ». Cependant, les parties peuvent accepter la recommandation, et elle sera également formalisée sous la forme d'une convention écrite et envoyée aux parties. L'article 14 du Règlement indique qu'« en acceptant une solution de manière électronique, les Parties mettent fin au conflit et sont liées à cette entente ». De plus, l'article 4 prévoit que le secrétariat contacte les parties pour s'assurer que l'accord ait été mis en œuvre. Si tel n'est pas le cas, elles sont invitées à se justifier.

L'accord doit satisfaire tous les intervenants et ne constituera pas, à l'instar de l'arbitrage, une décision qui tranche en faveur de l'une ou l'autre partie. Si l'accord des parties est nécessaire pour débiter la procédure ECODIR, une même harmonie des volontés est nécessaire pour y mettre fin par une entente dans l'intérêt des deux parties. La réussite dépend avant tout de la bonne volonté des parties en litige. Si un tel accord intervient et est accepté par les parties, il faut encore examiner sa valeur juridique.

Ce critère est retenu classiquement pour distinguer la conciliation ou la médiation par rapport à la procédure d'arbitrage. Ainsi, la sentence arbitrale est généralement considérée comme un acte juridictionnel qui a, par conséquent, autorité de chose jugée et peut acquérir la force exécutoire par l'ordonnance d'exequatur. De même, en cas de conciliation judiciaire, l'accord des parties est revêtu de la formule exécutoire. En revanche, l'accord qui met fin au litige lors d'une conciliation ou une médiation, ne dispose que de la force obligatoire d'une convention. La non-exécution de cette convention pourra également, le cas échéant, donner droit à l'octroi de dommages et intérêts à la partie préjudiciée.

Dans le cadre d'ECODIR, comme nous l'avons déjà indiqué, c'est clairement cette deuxième option qui a été choisie. Les parties aboutissent à un accord suite à une négociation avec ou sans l'aide d'un médiateur. Cette entente est, ensuite, formalisée par écrit et constitue une convention qui lie les parties. Seule la force conventionnelle tient lieu de valeur juridique. Lorsque le médiateur émet une recommandation, elle n'a aucune valeur juridique tant que les parties n'ont pas exprimé leur assentiment sur son contenu. Toutefois, il est laissé à la liberté des parties d'en décider autrement par convention et de prendre le

risque d'accepter la recommandation émise même si elle peut leur apparaître comme défavorable.

Par ailleurs, dans certains cas, la solution formalisée par écrit peut revêtir la forme d'une transaction. Sa caractéristique principale est de reposer sur des concessions réciproques des parties. Il faudra examiner la valeur juridique dont jouit la transaction dans chaque ordre juridique particulier.⁴⁶

La base volontaire de la procédure ECODIR et de la solution qui en découle, doit demeurer le meilleur garant de la bonne exécution de l'accord réalisé par les parties. En effet, il s'agit moins d'une procédure judiciaire, au détriment nécessaire de l'un, que de rechercher, par un dialogue continu, une solution négociée qui rencontre l'intérêt des deux parties.

⁴⁶ En Belgique, la transaction ne possède pas par elle-même une force exécutoire et une autorité de chose jugée à l'instar d'un jugement. Il s'agit d'un titre juridique qui peut servir de base à une demande en justice. Ensuite, la décision ratifie uniquement l'accord intervenu entre les parties. Cf. cf. P. DE LOCHT, "Les modes de règlement extrajudiciaire des litiges", in *Le commerce électronique européen sur les rails ?*, op. cit., p. 328 et s., n^{os} 615-627.

5. Appendix : Intellectual property rights related to Ecodir

In the future development of the Ecodir platform, some consideration must be given to the management of the intellectual property rights. This section aims to list the various protections available (protection of the content, the software and of denomination) and explains to what extent Ecodir might need to take them into consideration

I. Protection of the content of the website

The content of the website (including the lay-out and the logo) can be protected by various intellectual property rights among which copyright protection is obviously the most important. Nevertheless, it is also worth briefly mentioning the database protection and the design protection.

1. Copyright law

Copyright protection applies to “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”⁴⁷. This broad definition implies that both the content (including the logo) and the lay-out of the website can be protected by copyright.

The protection applies as soon as the work is created provided that the work is original in the sense that it is the author's own intellectual creation. The protection may not be subject to any formality⁴⁸.

The owner of the copyright enjoys some exclusive rights. For our purpose, the two most important are the exclusive right to reproduce the work and to communicate it to the public. Both rights would for example certainly be infringed if another company used the “copy-paste” function to place some content from the Ecodir website onto its own website.

In principle, copyright protection runs “for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public”⁴⁹.

Although copyright protection is granted on a national basis, international conventions such as the Berne Convention, the TRIPS agreement⁵⁰ and the Wipo Copyright treaty⁵¹ combine rules harmonizing copyright law and the principle of national treatment and provide thus in a certain way, a worldwide copyright⁵².

⁴⁷ Article 2 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971).

⁴⁸ Ibidem Article 5. 2.

⁴⁹ Article 1 of the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, *O.J. L* 290, 24 oct. 1993, p. 0009 – 0013.

⁵⁰ Annex 1C of the Marrakech Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

⁵¹ Wipo Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996

⁵² This last remark does not alter the territoriality principle according to which the copyright protection must always be enforced before national courts, according to the national laws.

2. Database law

Under the directive 96/9/EC⁵³, a database is “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means”.

Databases may be protected by copyright if by reason of the selection or arrangement of their contents, they constitute the author's own intellectual creation provided that the copyright protection of databases shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves⁵⁴.

A so called “sui generis” right to prevent extraction and/or re-utilization is also granted to the maker of a database “which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents”⁵⁵. This right lasts for fifteen years after the completion of the making of the database with a possible renewal with each substantial new investment⁵⁶.

3. Design law

A new regulation⁵⁷ recently introduced the community design. Although computer programs are excluded from the definition⁵⁸, this is understood to mean the programs themselves, ie the lines of code and the functionality (already protected by copyright, see *infra*). Specific graphics which are produced by computer programs, such as icons or website design, may be considered protectable under the new regulation as graphic symbols.

Design protection extends to registered and unregistered designs with an individual character but the scope and the length of protection are broader for registered designs.

II. Protection of the software

In order to provide its services, the ECODIR platform uses software's which can be protected by copyright law and patent law. We will shortly present the differences and the consequences attached to those two forms of protection with a focus on online dispute resolution software's.

1. Copyright protection

The Directive 91/250/EEC on the legal protection of computer programs⁵⁹ grants copyright protection to the particular expression in any form of a computer program. Nevertheless, it is

⁵³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *O.J. L 077*, 27/03/1996 P. 0020 – 0028, article 1.

⁵⁴ *Ibidem*, article 3.

⁵⁵ *Ibidem*, article 7.

⁵⁶ *Ibidem*, article 10.

⁵⁷ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, *O. J. L 003*, 05/01/2002 p. 0001 - 0024

⁵⁸ *Ibidem*, article 3.

⁵⁹ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, *O.J.*, L 122, 17/05/1991, p. 0042 – 0046.

understood that “ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright”⁶⁰.

In practice, this means that copyright “prohibits a substantial copy of the source code or object code but does not prevent the many possible alternate ways to express the same ideas and principles in different source or object code”⁶¹.

As mentioned above, copyright protection does not require any registration or formality and lasts for a long period of time.

2. Patent protection

Patent protection on the other hand requires substantial formalities (patent examination) and lasts for a smaller period of time (i.e. twenty years). Nevertheless, a patent grants protection for an invention and the principles or ideas which underlie such invention (as defined by the patent claims).

Thus, the holder of a patent for a computer-implemented invention has the right to prevent third parties from using any software which implements his invention. This principle holds even if various ways might be found to achieve the same result by using programs with different code because the result as such can be protected, no matter the way to get to it.

The question of the patentability of computer programs and computer implemented business methods is solved differently in Europe and in other countries such as the United States.

2.1. Patent protection in Europe

Under article 52(2) of the European Patent Convention⁶², computer programs ‘as such’ are defined as not being inventions and are thus excluded from patentability⁶³.

Nevertheless, the Boards of Appeal of the European Patent Office have held that computer-implemented inventions can be considered as patentable when they bring a *technical contribution* to the state of the art because they are considered not to relate to computer programs ‘as such’⁶⁴.

A proposal of directive⁶⁵ confirms this case law and further defines the technical contribution as a contribution to the state of the art in a technical field which is not obvious to a person skilled in the art. This means that computer programs which do not show this technical contribution will be considered as computer programs as such and thus excluded from the patentability.

⁶⁰ Article 1 of the directive 91/250/EEC.

⁶¹ Explanatory memorandum of the proposal for a directive of the European Parliament and of the Council on the patentability of computer-implemented inventions, Brussels, 20.02.2002, COM(2002) 92 final, p. 8.

⁶² The “Munich Convention” entered into force on 7 October 1977.

⁶³ Business methods ‘as such’ are also excluded from patentability.

⁶⁴ For more details, see T208/84, 15 July 1986, VICOM ; T26/86, 21 May 1987, KOCH and STERZEL ; T769/92, 31 May 1994, SOHEI ; T 935/97 & T 1173/97, IBM (available at <http://www.european-patent-office.org/>).

⁶⁵ Proposal for a directive of the European Parliament and of the Council on the patentability of computer-implemented inventions 2002/0047 (COD)

This proposal of directive has been amended and approved by the European Parliament on September 24th 2003⁶⁶. The amended text⁶⁷ mentions that “*Member States shall ensure that data processing is not considered to be a field of technology within the meaning of patent law, and that innovations in the field of data processing are not considered to be inventions within the meaning of patent law*”⁶⁸. One could reasonably argue that the ODR platforms are merely a data processing system and thus excluded from patentability by virtue of the new amendments. However at this stage, the proposal of directive has not yet reached the end of its legislative process.

2.2. Patent protection in the United States

The United States on the other hand, only require computer program related inventions to provide a useful, concrete and tangible result (see for an illustrative example the State Street Bank decision)⁶⁹. That the U.S. does not require the invention to provide a technical contribution means that the restrictions on patenting of business methods or computer programs ‘as such’ (apart from the requirements of novelty and inventive step) are negligible.

2.3. Consequences of the difference of legal regime

The consequence of the above is that many of the e-commerce inventions protected in the United States as a result of the above mentioned State Street Bank decision will not be patentable at the European Patent Office unless the invention provides a technical contribution outside of a method of doing business⁷⁰.

There are already a number of US patents and applications relating to methods and/or computer programs used for online dispute resolution services⁷¹.

2.3.1. Granted patents

The first US patent on ODR computer based method is owned by ICANN (February 27, 1996⁷²) and relates to a “computer-based method and apparatus for interactive computer-assisted negotiations”.

A computer-based method and apparatus for **interactive computer-assisted negotiations** assists multiple parties involved in complex multiple issue negotiations in reaching an agreement that optimizes both the individual and overall benefit to the parties. Each of the parties to a conflict or dispute to be negotiated enters their preferences concerning each issue of the conflict into a computer system. If desired, each party to the dispute can have a separate computer system so that each party's preference information remains confidential to that party. The preference information includes data on satisfaction functions for each of the issues which defines a party's relative level of satisfaction as a function of a numerical value for the outcome of that issue. Each party may also enter one or more proposed alternative agreements which provide the party with a specified level of satisfaction. Using standard mixed integer

⁶⁶ P5_TA-PROV(2003)0402

⁶⁷ See Amendments 45, 69 and 107.

⁶⁸ Article 3a (new) and article 2 point (b).

⁶⁹ See State Street Bank & Trust Co. v. Signature Financial Group, 149 F.3d 1368 (Fed. Cir. Jul. 23, 1998).

⁷⁰ R. Hart, P. Holmes and J. Reid, “The Economic Impact of Patentability of Computer Programs”, Report to the European Commission, Study Contract ETD/99/B5-3000/E/106, p 25.

⁷¹ What is reproduced is the abstract of the patents. The abstract may not be used for interpreting the scope of the claims and is merely of an informative value.

⁷² US Patent Number: 5,495,412

linear programming techniques, the preference information is employed to solve an optimization problem in which an alternative agreement, known as the common base if accepted by all parties, is first generated that provides at least the same level of satisfaction to each party that their own proposal provides, while at the same time minimizing the maximum gain and satisfaction achieved by any party between their proposal and the generated alternative agreement. Next, an optimal agreement to the conflict is determined, again using linear programming techniques, by maximizing the minimum gain in satisfaction achieved by each of the parties in going from the common base to the improved alternative. This will, at the same time, maximize the overall benefit to all of the parties. For maximum security of all party's confidential information, a separate computer system located at a neutral site can be connected to each individual party's computer system. In this case, alternatives are generated at the neutral site and transmitted back to each party's own computer system.

This first patent has been followed by numerous other patents. For example the US patent of April 20, 1999⁷³

A **computer program and a programmed apparatus for automatically handling and resolving user complaints** against subjects is disclosed. The program includes a routine for directing the apparatus to receive a complaint from a complainant against a subject, a routine for directing the apparatus to receive from the subject a response to the complaint, a routine to direct the apparatus to store the complaint and response in a data record, and a routine for negotiating a settlement of the complaint.

Some applications have also been made internationally through the Patent Cooperation Treaty with designation of European Countries⁷⁴. For example, the Cybersettle company⁷⁵ holds a large patent portfolio in the area of online dispute resolution. Cybersettle received its first patent in a European country (United Kingdom) on January 29 2003⁷⁶. These patents protect their so called "double-blind bid" dispute resolution process.

- US patent of December 11, 2001⁷⁷

A **computerized system for automated dispute resolution through an Intranet website via the Internet** or other communications linkage for communicating and processing a series of demands to satisfy a claim made by or on behalf of a claimant or other person involved in a dispute with at least one other person (...) and a series of offers to settle the claim through at least one central processing unit including operation system software for controlling the central processing unit is disclosed. Preferably the system also allows for the collection, processing and dissemination of settlement data generated from the settlement through the operation of the system for use by sponsors and claimants in establishing the settlement value of future cases. Also disclosed is a method for communicating and processing a series of demands and a series of offers through the system.

⁷³ US Patent Number: 5,895,450

⁷⁴ See for example : EP Patent Application Number : EP1242960

⁷⁵ According to the website <http://cybersettle.com/> : Cybersettle is the official and exclusive online settlement tool of the Association of Trial Lawyers of America and the Canadian Bar Association. In its brief history, Cybersettle processed 75,000 transactions and facilitated approximately 500 million dollars in insurance claims. There are over 100,000 attorneys and 10,000 claims adjusters representing over 1,900 claims offices in Cybersettle's growing customer base.

⁷⁶ Publication Number GB2345997 dated 26.07.2000

⁷⁷ US Patent Number: 6,330,551

2.3.2. Patent applications

In addition to the granted patents, numerous patent applications are still pending. Most of the patent applications originate from the US (or Canada) and then the application is usually extended to other countries among which European countries.

In order to illustrate the increasing number of patent application in the area of online dispute resolution, we have found the number of eight US patent applications for a period of only 14 months (from November 2001 to January 2003).

- US patent applications of November 22 2001⁷⁸
"A **complaint management system**, also referred to as a disputes system, **enables registered consumers to file a complaint against a merchant**. During complaint preparation, the disputes system advises the consumer of relevant cases and other information, allows the consumer to vent their emotions, and prepares a well-formed complaint on behalf of the consumer".
- US patent application of March 28 2002⁷⁹
"A **web-enabled or on-line ADR method and system** that permits businesses and litigants to engage in dispute resolution totally online. Unlike known online ADR methods summarized above which primarily engage in e-mail exchanges, the present invention provides ADR services through the use of customized video conferencing being integrated into the system to allow participation in the ADR process in real-time and face-to-face via video conferencing".
- US patent applications of June 6, 2002⁸⁰
The present invention provides a **system and method for alternative dispute resolution** involving multiple offers and flexible setting of settlement parameters. Individuals determine whether settlement offers overlap with one another without deciding the settlement terms. Terms may be monetary, non-monetary, or time-limited. Participants access the system on a web site. Participants submit a series of confidential settlement demands beginning with non-monetary demands. Unique identifying devices match respective settlement demands against one another. When a participant signs on to the web site, a "click-wrap" agreement binds him to the terms of any settlement reached. Participants pay a fee for each round of negotiations. Where settlement figures overlap, an algorithm resident on the server of the present invention chooses the midpoint between the figures. Participants may restrict the analysis to knowing whether their demands overlap. If a settlement is reached, email messages are sent to the parties.
- US patent applications of September 10, 2002⁸¹
"A **method for dispute resolution** comprises the steps of receiving on a server a plurality of users connected to the server via a communications network, engaging, upon notification of a dispute by a first one of the users, software guiding the first user through procedures for initiating the dispute resolution process, wherein the software gathers plaintiff information from the first user corresponding to the dispute and receiving from the first user a first proposed a rule governing behavior in situations corresponding to the dispute in combination with the steps of notifying a second one of the users identified by the first user as a party to the dispute of the initiation of the dispute resolution process, soliciting from the second user defendant data corresponding to the dispute and one of a second proposed rule governing behavior in situations corresponding to the dispute and proposed modifications to the first

⁷⁸ US Patent Application Number: US2001044729

⁷⁹ Patent Application Number: US2002038293

⁸⁰ US Patent Application Number: US20020069182

⁸¹ US Patent Application Number: US20020133362

proposed rule and determining a result of the dispute resolution process based upon the plaintiff data, the defendant data, the first proposed rule and the one of the second proposed rule and the proposed modifications to the first rule".

- US patent applications of October 10, 2002⁸²
"Electronic systems and methods for providing dispute management in a dispute management application are described".
- US patent application of August 29 2002⁸³
"A method and computerized system for carrying out litigation, adjudicative processes, or the resolution of similar types of disputes, via the Internet, incorporating operation system software that enables 2 or more parties to such litigation, adjudicative process, or dispute, to prepare for such process in independent secure workrooms situate on dedicated Web sites and to meet with a resolution professional, such as a judge, adjudicator, or arbitrator, in a secure resolution room, also situate on a dedicated Web site, is disclosed. An 8-step method and computerized system providing an end-to-end alternative to commercial litigation and conventional arbitration and incorporating the following functionality is also disclosed"
- US Patent application of January 16, 2003⁸⁴
"A method and system for performing online dispute resolution ("ODR") via a central ODR Web site. Two ODR processes are disclosed. First, a NEGO-MED-ARB System provides an integrated negotiation, mediation and arbitration dispute resolution solution to customers and merchants conducted online. The NEGO-MED-ARB System enables an authorized merchant to link its e-commerce Web site to the dispute resolution services centralized on the ODR Web site. The link is performed by a distinctive, recognizable Trust Mark displayed on the e-commerce Web site and identifying the ODR services; a consumer browsing the e-commerce Web site hyperlinks to the ODR Web site by clicking on the Trust Mark. The ODR Web site then provides an online framework for the parties to exchange information and proposed solutions for resolving their dispute. Qualified mediators/arbitrators are appointed to resolve disputes online which the parties are unable to settle by themselves. Second, a Negotiation/Mediation/Arbitration System provides ODR services to any parties who agree to use it. A contract clause providing for such an agreement is made available on the ODR Web site for parties to insert in their contracts. The parties may agree to use one or more ODR services, including negotiation, mediation or arbitration; the mediation and arbitration is performed online by qualified mediators and arbitrators".
- US Patent application of February 6, 2003⁸⁵ : this application has been introduced by a lawyer specialized in the mediation area (see the website of M. Butler at <https://secure.butlermediation.com/>)
"A computer-implemented system and process for the purpose of dispute resolution and management. The invention provides a system and method particularly adapted for tracking and mediating disputes, such as multiparty lawsuits, including both simultaneous and asynchronous submission of offers and demands in the mediation/negotiation context thus eliminating many of the inefficiencies inherent in traditional mediation processes"

⁸² US Patent Application Number: US20020147604

⁸³ Patent Number: US2002020464

⁸⁴ US Patent Application Number: US20030014265

⁸⁵ US Patent Application Number: US20030028474

2.4. Conclusion on patent protection

It is now too soon to know exactly if such patents will be enforceable⁸⁶ in the United States and will be granted at a European level. Moreover, as related to 'Internet patents', the possible cases would also have to face conflict of laws issues. It is not yet definitely established whether the infringing use of a US 'Internet patent' by a European business would be sufficient to provide a ground for personal jurisdiction in the US.

"The recurring problem of enforcing U.S. intellectual property rights against a foreign defendant will be a problem here, too. In the past, U.S. patent owners had certain remedies against the non-U.S. defendant, such as blocking importation through an action before the International Trade Commission. Such remedies will be of little help against an infringer using a patented business method or software from a computer located in a country that is not friendly to the U.S."⁸⁷

As a conclusion, patent protection for 'Internet patents' is still subject to considerable debate (even in the US) and the recent experience of the United States in this field has not permitted to answer all the questions. Nevertheless, whoever plans to launch an international dispute resolution platform would definitely have to take these various elements into consideration in the choice of the software provider.

III. Protection of the denomination

The word "ECODIR" is also a very important asset of the platform because it carries the fame and the confidence that the project has already acquired and helps consumers to distinguish the Ecodir platform from other providers.

1. Trademarks

A trade mark may consist of "any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, provided that such signs are capable of distinguishing services of one undertaking from those of other undertakings"⁸⁸.

Following this broad definition, both the denomination "ECODIR" and the logo could be registered as a trademark as they are capable of distinguishing the services provided by Ecodir from those of another provider. The words "Consumer Complaint Form" on the other hand would most probably not be registrable as a trademark because it is merely descriptive of the services and is therefore not able of distinguishing the services provided by ECODIR.

The owner of a registered trademark is entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered and even any sign where, because of its identity with, or similarity to, the trade

⁸⁶ See for example the Amazon's one-click patent case.

⁸⁷ The Internet and Federal Courts: Issues and Obstacles, Statement of Mark A. Thurmon on behalf of the American Intellectual Property Law Association before the subcommittee on courts and intellectual property committee on the judiciary United States House of Representatives, June 29, 2000, <http://www.aipla.org/html/internetandfederalcourts.html>

⁸⁸ Article 2 of the Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, O.J., L 040 , 11/02/1989, p. 001 – 0007 and article 4 of the Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, O.J., L 011 , 14/01/1994, p. 0001 - 0036

mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public⁸⁹.

Trademark protection is only granted for the territory in which the trademark has been registered (principle of territoriality) and for the category of services which the trademark has been registered (principle of speciality).

Registration of a trademark may prove to be expensive due to the international aspect of Ecodir which means that the trademark should be registered at least in the most important target countries (certainly the United States, Canada and Europe).

2. Domain names

Domain names represent the alphanumeric reference to websites on the Internet. They are the translation of the numeric IP-number addresses, which are necessary to identify and contact a computer on the Internet (e.g. for the domain name <http://www.ecodir.org> is the translation of the IP address: <http://194.106.143.90/>). The domain names always consist of a top level domain, abbreviated 'TLD' (e.g. '.org' for organizations and '.com' for commercial business) in combination with one or more sub-level domains (e.g. ECODIR). Domain names within the same TLD are unique.

Domain names constitute business identifiers. Internet users will often assume that the company's domain name is similar to its denomination or trademark. Consequently, the better the domain name corresponds with those, the better is the chance that more people will find and visit their website.

Even if domain names function as business identifiers in the same way as trademarks, the allocation of the domain names is normally not solely dependent upon that the applicant has a trademark right to the name he wishes to register. Instead, the domain names are allocated on a "first come, first served" basis. Consequently, in order to avoid being refused to register a preferred domain name and even more in order to avoid another business profiting from the its name, a company should always try to obtain the domain corresponding to its trademark or its denomination as early as possible. In this regard, should ECODIR officially be launched as a business, it would be advisable to register as soon as possible the domain name (<http://www.ecodir.com>) in order to prevent another business from registering it and using it⁹⁰. Of course some legal remedies⁹¹ are provided to put an end to the most obvious abuses (e.g. 'cybersquatting') but as the proverb says "it is always easier to prevent than to cure".

⁸⁹ Article 5 of the Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, O.J., L 040 , 11/02/1989, p. 001 – 0007 and article 9 of the Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, O.J., L 011 , 14/01/1994, p. 0001 - 0036

⁹⁰ A domain name registration is a relatively cheap operation and a lot of companies have registered their domain name in various TLD (e.g. .com, .biz, .net...). Some companies even go further in this practice by registering their trademark or denomination with different spelling (e.g. yahoo.com and yahooo.com).

⁹¹ See for example ICANN, Uniform Domain Name Dispute Resolution Policy, 25th <http://www.icann.org/udrp>.

3. Meta-tags

Meta-tags are keywords that are inserted in the source code of a website but are not displayed by the browser but are generally used by search engines.

The problems arise when a company uses someone else's registered trademark or denomination in its meta-tags in order to promote its own web pages. For instance, famous trademarks like Nike or IBM are popular search criteria's. Consequently, by incorporating those words into the meta-tags, good possibilities exist that the webpage in question will appear on the search engine's result list each time a person carries out a search for Nike or IBM.

In several cases, courts have held that the use of a third party's trademark in meta-tags constitutes a trademark infringement (decisions have also been based on unfair commercial practices law). At least this is the case if the companies in question are commercial competitors.

To keep track of if somebody uses meta-tags in conflict with other trademarks, the companies should periodically carry out search engine watches. By effecting searches for one's trademark(s), undesired search results can easily be detected. One should also look into the source code of the web pages in question in order to determine how the term has been used in the meta-tags.

4. Hyperlinks

By clicking on a hyperlink, the internet user is directed to something elsewhere on the web, whether that something is another web page, a document, or another file, and whether it resides on the same domain or on an external domain.

Hyperlinks may require the use of a trademark or a commercial denomination present in the domain name but the real critical issue regarding the use of hyperlinks is not there and rather concerns the liability issues.

The e-commerce directive⁹² contains no special provisions regarding hyperlinks. Despite the lack of a uniform EU-wide regulation there is a clear trend that the people using hyperlinks can be held liable for the content they link to if they have knowledge of unlawful content on the web page (such as music or software piracy, illegal online casino's). Without positive knowledge of the entity, liability may nevertheless arise but the rules may still vary from country to country.

We recommend Ecodir to follow some principles which guaranty some legal certainty. An interesting report has been published by the Internet Rights Forum⁹³ which recommends that persons establishing hyperlinks amongst other things:

⁹² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *O.J L 178* , 17/07/2000 P. 0001 – 0016.

⁹³ Internet Rights Forum, Hyperlinks: legal status, Recommendation Report, published on March 3rd, 2003, <http://www.foruminternet.org>.

- *“obtain the prior approval of the owners of the linked-resources in various cases (eg. for deep links made directly toward files which can be downloaded or executed, for links in cases where trademarks are concerned);*
- *make sure that the presentation of the link, whether simple or deep, would not lead the visitor to believe that a cooperation existed between the linking site and the linked source, particularly when the nature of the linking site, the linking page or the commentary accompanying the pointer is apt to undermine the image of the linked work;*
- *respect the hyperlink policies clearly posted by the site holders”.*

IV - RECOMMANDATIONS

1. De la nécessité d'une approche globale du commerce à distance

Dans la mesure où la réalité de ce marché se conçoit d'une imbrication des techniques utilisées (site web + formulaires de commande papier ; catalogue papier + commandes par internet), il serait dangereux de réserver les ODR aux seules opérations du commerce électronique. Les avantages de l'utilisation de l'électronique dans la recherche d'une solution en cas de conflits entre les parties doivent bénéficier également aux opérations classiques ou mixtes du commerce à distance.

2. D'un renversement de perspective

Classiquement, ceux qui analysent les ODR s'attachent aux fonctions nobles de l'ODR, c'est-à-dire à la recherche assistée par un tiers d'une solution ou à l'imposition par celui-ci d'une solution ; soit les fonctions de médiation, de conciliation voire d'arbitrage.

Or, il appert que ces fonctions s'appuient sur des fonctions bien plus fondamentales qui, d'ailleurs bien souvent suffisent à l'élaboration d'une solution. En particulier, les fonctions d'élaboration d'une plainte, de gestion du dépôt d'une plainte et de négociation constituent les premières étapes et bien souvent les seules étapes de l'ODR.

3. De la fonction d'élaboration d'une plainte

La difficulté essentielle pour une partie non satisfaite est de formuler correctement sa plainte et de la décrire de manière telle que l'autre partie puisse facilement l'appréhender.

La solution prônée est donc de développer des systèmes assistés d'un arbre de décision et en tenant compte de la diversité des secteurs : la description de la défectuosité d'un produit n'a rien à voir avec les problèmes rencontrés en matière de protection des données en cas de « spam ».

A propos de ces descriptions, on sera attentif à l'intérêt d'une nomination des « motifs » de plainte. Un tel effort a été entrepris par l'Institut suisse de normalisation et devrait être repris par le Comité Européen de Normalisation (CEN).

L'existence de formulaires normalisés permet par ailleurs leurs traductions dans de multiples langues.

4. De la fonction d'accueil de la plainte et de son orientation

La diversité des opérations pour lesquelles plainte peut être adressée détruit l'idée selon laquelle un collège unique de médiateurs pourrait résoudre l'ensemble des conflits. S'il s'agit de protection des données, le médiateur sera sans doute différent que s'il s'agit de violation affirmée d'un droit de propriété intellectuelle.

La caractère international de certaines opérations à distance plaide également pour une diversité des collèges de médiateurs. Enfin, cette diversité existe déjà : ainsi, nombre de pays ont instauré des commissions litiges « voyages », des « ombudsman » dans les secteurs financiers ou d'assurance sans parler de quantités d'autres collèges dont le statut est tantôt public que privé, tantôt mixte. A notre opinion, de tels collèges devraient être conservés même si leur mode de fonctionnement devrait être revu et intégrer l'utilisation des I.C.T.

A cet égard, se dessine l'intérêt d'une ou de plusieurs plateformes en réseau qui aiguilleraient la plainte reçue vers les différents collèges, en cas de non réussite de la négociation directe.

5. De la fonction de gestion du dépôt d'une plainte

La réception d'une plainte doit faire l'objet de l'attribution d'un numéro lors de l'accusé de réception. La transmission de la plainte doit à l'entreprise doit s'opérer en deux temps dans la mesure où seule l'entreprise ayant accepté de jouer les règles du jeu de l'ODR doit pouvoir recevoir les détails de la plainte (argument : législation en matière de protection des données).

Un accusé de réception de la plainte doit être émis par l'entreprise. Au-delà, les étapes de la négociation font l'objet d'une mémorisation dans la base de données de l'ODR qui joue un rôle purement technique de TTP, attestant des différents échanges entre les deux parties, échanges soumis aux règles inscrites dans un code de conduite (voir infra n°).

6. De la nécessité de distinguer nettement la plate-forme technique, des collèges de médiateurs

Le point 2 mettait en avant la nécessité de mieux prendre en considération les fonctions préalables à la médiation. Ces fonctions peuvent être prises en compte par une plate-forme technique, distincte des collèges de médiateurs dont l'existence peut être totalement indépendante de la plate-forme.

Le rôle de la plate-forme technique serait

- a. la mise à disposition via le site d'un système de formulation de plaintes ;
- b. la réception de la plainte et sa transmission à l'acteur contre lequel est dirigé la plainte ;
- c. la conservation d'une trace des échanges et, le cas échéant, de la transmission résultat de la négociation.
- d. en cas d'échec, la transmission vers le collège de médiateurs ad hoc.

7. Du code de bonne conduite entamant la négociation entre parties

Notre sentiment est qu'il serait utile de lier la participation à la phase de négociation voire à la suite (médiation, conciliation) à l'acceptation d'un code de bonne conduite dans ces négociations. Ainsi, l'obligation de répondre promptement, de veiller à des réponses adéquates, de ne pas s'opposer à la médiation, des engagements en matière de respect de la protection des données seraient utiles à mentionner dans ce « code ».

Un tel code de conduite pourrait également contenir des dispositions relatives aux sanctions à prendre en cas de non respect de ce code.

8. De l'interprétation à donner aux principes figurant dans la recommandation du 4 avril 2001

La distinction proposée entre les fonctions de la plate-forme technique et celles des collèges de médiateurs amène à relire les principes clés de la recommandation.

- le principe de l'impartialité des organes résolvant le litige s'applique aux collèges des médiateurs. Dans la mesure où il s'agira souvent soit de personnes tenues d'une déontologie (membres du barreau), soit de personnes dont la nomination comme membre du collège est liée à un engagement d'impartialité, le principe ne pose pas de problèmes. L'impartialité de la plate-forme peut également se poser dans la mesure où des sanctions (cf. infra n°) pourraient devoir être appliqués en cas de non respect du code de conduite. Il importe alors que le mode de financement de la plate-forme, le statut de celle-ci ne la conduise pas à ne pas sanctionner une entreprise peu respectueuse des règles.

Une solution peut être la création d'un comité de surveillance liée à cette plate-forme dont le statut, la composition et les compétences garantiraient l'impartialité. Ce comité de surveillance serait en outre directement contactable par une hotline sous son propre contrôle.

- la transparence de la procédure s'applique tant à la phase de négociation, qu'à celles qui lui font suite.
- l'effectivité de la procédure est définie de manière bien trop restrictive par la recommandation. L'accessibilité y compris en ligne est loin de représenter la seule mesure d'effectivité. L'effectivité suppose
 - a. que des règles claires permettent le bon fonctionnement de la procédure (cf. supra n° 7) et que leur non respect entraîne la sanction (cf. supra n° 8).
 - b. que la conclusion d'un accord lors de la négociation directe ou par la médiation voire la décision prise en cas de conciliation soit suivie d'effets faute de quoi sanction doit exister.

